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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of a closed but unsealed paper bag, found in the trunk of respondent's automobile during a lawful search of the automobile, was permissible under the Fourth Amendment.

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UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*, 1a-117a) is as yet unreported. The opinion of the panel (Pet. App. C, *infra*, 120a-158a) is also unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 118a-119a) was entered on March 31, 1981. On May 21, 1981, the Chief Justice extended the time

within which to file a petition for a writ of certiorari to and including June 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted on one count of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to a term of from 20 months to five years' imprisonment, followed by a six-year special parole term. Both the panel and the en banc court of appeals reversed the conviction.

1. As reflected in the decision of the en banc court (App. A, *infra*, 4a-6a), evidence developed during a suppression hearing showed that on November 27, 1978, a District of Columbia police detective was told by a reliable informant that he had observed a man known as "Bandit" selling narcotics from the trunk of a maroon two-door Chevrolet Malibu automobile. Upon arriving in the area described by the informant, the detective, accompanied by two other police officers, observed a vehicle being driven by respondent matching the informant's description. The officers determined that it was registered to respondent, who was nicknamed "Bandit." They then stopped the vehicle, identified themselves, and asked respondent to step out. While one of the officers searched respondent, another police officer spotted a round of ammunition on the front seat of the car. The officer retrieved the ammunition and searched the interior of the vehicle for weapons, finding a pistol in the glove compartment.

After respondent was arrested, another officer unlocked and searched the vehicle's trunk. In it he

discovered a brown paper lunch bag with a folded but unsealed top, and a zippered leather pouch. He opened the paper bag and discovered in it a number of glassine envelopes each containing a white powder. Leaving the paper bag and the leather pouch in the trunk, the officers drove respondent's automobile to the police station. At the station, the officers reopened the paper bag and sent the glassine envelopes to the police laboratory for analysis. Each proved to contain a quantity of heroin. One of the officers then opened the leather pouch as well, and found that it contained $3,200 in currency. No search warrant had been obtained at any point in this sequence of events. On the basis of this evidence, adduced at the suppression hearing, the trial judge denied respondent's motion to suppress the contents of the paper bag and the leather pouch.

2. On appeal, a panel of the court of appeals reversed respondent's conviction. The members of the panel agreed that, because the police lacked a search warrant, the search of the zippered leather pouch was unlawful, and the currency that was discovered in the pouch should have been suppressed (App. C, *infra*, 137a-138a). However, a majority of the panel held (*id.* at 124a-137a) that the warrantless probable cause search of the paper bag was permissible because respondent "could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession" (*id.* at 136a). Concluding that admission into evidence of the currency found in the pouch was not harmless error (*id.* at 138a n.7), the panel remanded for further proceedings consistent with its opinion.

In distinguishing respondent's paper bag from the leather pouch and other kinds of substantial and secure containers in the nature of luggage, the panel

majority relied upon this Court's statement in *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979), that although a warrant is generally required to search luggage seized from a vehicle, absent consent, exigent circumstances, or other recognized predicate for a warrantless search, "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." The panel observed that unsealed paper bags differ from luggage and other common repositories for personal effects in two respects deemed significant for Fourth Amendment purposes. First, the panel noted the physical and functional attributes of such a container:

> [P]aper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

App. C, *infra*, 134a. Second, the panel noted the conventional uses to which paper bags are put, and the limited expectation of privacy therein allowed by society as a consequence:

> [P]aper bags are not *inevitably* associated with the expectation of privacy. See *Arkansas* v. *Sanders*, 442 U.S. 752, 762 (1979). Although a

> paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with day-to-day living. Luggage typically functions as a portable closet and chest of drawers * * *.

Ibid.; emphasis in the original. These considerations undercut any expectation of privacy sufficiently to render reasonable the warrantless search of the paper bag. The panel majority accordingly held that the search of the paper bag found in the trunk of respondent's car did not violate his Fourth Amendment rights.

3. Acting upon respondent's suggestion, the court of appeals granted rehearing en banc. In an opinion joined by seven of its members, the majority of the court rejected the panel's conclusion that the warrantless search of the unsealed paper bag was permissible (App. A, *infra*, 1a-27a).[1]

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[1] On rehearing en banc the government did not challenge the panel's ruling regarding the warrantless search of the leather pouch on its merits. The government did argue that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), should not have been applied retroactively to the search in issue, and that, for that reason, none of the evidence should have been suppressed. The court of appeals rejected that argument, holding *Arkansas* v. *Sanders* applicable retroactively, at least as to searches subsequent to *United States* v. *Chadwick*, 433 U.S. 1 (1977) (App. A, *infra*, 6a-10a). Although we question the correctness of that ruling for the reasons set forth by Judge Wilkey in his dissent (*id.* at 53a-77a), we have not raised that issue in this petition because of the far greater continuing importance of the ruling on the merits, as to which we seek this Court's review.

Although the majority of the en banc court agreed that respondent's car was properly stopped and searched, and the paper bag and leather pouch properly seized, it held that "no 'special exigencies' justified opening the pouch or the bag without a warrant," and that no other "established, well-drawn exception" to the warrant requirement was applicable (App. A, *infra*, 20a, 21a). Declining to adopt what was termed "an unworthy container rule," the en banc court perceived no distinction "between [the] pouch and [the] bag in a manner that makes theoretical or practical sense" (*id.* at 27a). The footnote in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 765 n.13, noting limitations on the reach of that decision was interpreted as an exhaustive listing of circumstances in which a warrantless search would be permitted, embracing only containers whose contents are in plain view, or whose appearance otherwise serves to disclose their contents (App. A, *infra*, 25a). In the court of appeals' view, an exception based upon the nature of, and the conventional uses associated with, certain classes of containers would ensnare those "without the means or the sophistication to use worthy containers," and "destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant" (*id.* at 24a-25a). The en banc court accordingly concluded that the contents of the paper bag, as well as those of the leather pouch, should have been suppressed.

Four members of the court dissented, Judge Tamm, who had written the panel opinion, adhered to his original reasoning and conclusions in an opinion (App. A, *infra*, 28a-47a) joined by Judges MacKinnon and Robb, each of whom wrote separately as

well (*id. at* 48a-49a, 50a).[2] Judge Wilkey issued a separate dissent on the ground that *Arkansas* v. *Sanders*, *supra*, was not properly applied retroactively to the search at issue (*id.* at 50a-117a).[3]

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question of Fourth Amendment law, similar to that now before the Court in *Robbins* v. *California*, cert. granted, No. 80-148 (Jan. 19, 1981):[4] Whether a warrant must ordinarily be obtained in order to examine, with probable cause, the contents of unsealed paper bags or similar insubstantial containers that lack the functional attributes of, and are not imbued with the privacy expectations that extend to, luggage. The decision of the en banc court of appeals that, for purposes of the Fourth Amendment, there is no distinction between conventional types of luggage and an unsealed paper bag is contrary to the decisions of eight other courts of appeals, which have declined to extend the warrant requirement to paper bags and

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[2] Judge MacKinnon would have upheld the warrantless search of the leather pouch as well as the paper bag, and would accordingly have affirmed the conviction.

[3] Judge Wilkey would, however, have joined the majority as to the issues on the merits, reluctantly concluding that *Arkansas* v. *Sanders* controls this case, but criticizing both the decision in *Sanders* and the exclusionary rule. Judge MacKinnon joined in so much of Judge Wilkey's dissent as addressed the retroactivity issue.

[4] *Robbins* involves the warrantless opening by state police officers of two bulky packages wrapped in opaque plastic, each sealed with a strip of tape. The packages had the general configuration of marijuana bricks and when opened proved to contain that substance.

similar insubstantial containers.[5] Indeed, as the en banc D.C. Circuit noted (App. A, *infra*, 15a n.16) many of the other courts of appeals have cited the panel decision in *Ross* with approval.[6] As is explained in our brief as amicus curiae in *Robbins*, the question whether the necessity of obtaining a warrant before seaching a container following its lawful seizure turns upon its status as a "common repository for one's personal effects," *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, or whether some different standard applies is a matter of considerable importance for federal law enforcement activities.[7]

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[5] See, *e.g.*, *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (plastic and paper bags); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980) (beverage bag); *United States* v. *Bush*, Nos. 80-1116, *et al.* (3d Cir. Mar. 24, 1981) (unsealed cardboard box); *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) (pharmacy bag); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed paper bag); *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980) (paper bag); *United States* v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) (same); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979) (plastic bags of marijuana); but see *United States* v. *Moschetta*, 646 F.2d 955 (5th Cir. 1981) (paper bag); but cf. *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979) (sealed box, warrant required) adhered to on rehearing, 615 F.2d 10 (1980).

[6] Subsequent to the en banc decision in *Ross*, a panel of the Fifth Circuit has followed the en banc *Ross* decision, in *United States* v. *Moschetta*, *supra*, thereby underscoring the gravity of the split among the circuits.

[7] A copy of our brief in *Robbins* is being served upon counsel for respondent along with this petition. This case differs from *Robbins* in several respects. First, no retroactivity question is presented in this petition. See note 1, *supra*.

1. On two recent occasions, this Court has held that, absent exigent circumstances, consent, or circumstances constituting a proper search incident to arrest, a warrant is required before law enforcement officials may search luggage, even though they have probable cause to believe that it contains contraband or evidence of a crime, and even though the luggage may be taken from a motor vehicle by police as an incident to a lawful search. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762-766 (suitcase); *United States* v. *Chadwick*, 433 U.S. 1 (1977) (double locked footlocker). However, the Court has stressed the narrowness of its holdings, cautioning:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. * * * There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

Arkansas v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13.[8]

Second, unlike *Robbins*, there is here no basis for concluding that the exterior of the parcel in question divulged its contents. Third, the package here at issue was not sealed as were the parcels in *Robbins*. Depending upon the result reached in *Robbins* and the reasoning supporting it, plenary consideration of this case may be appropriate.

[8] Mr. Justice Blackmun noted the effect of *Sanders* was to leave the status of other kinds of containers "hanging in limbo." 442 U.S. at 768 (Blackmun, J., dissenting).

The lower courts, in passing upon the validity of warrantless, probable cause searches of various types of containers and packages, have generally distinguished containers that normally function as repositories for personal effects from paper bags or similar containers, declining to extend the warrant requirement to the latter. See note 5, *supra*. As we noted in our brief in *Robbins* v. *California*, *supra*, at 10-11, these decisions rest not only upon the language of *Sanders*, but upon the factors that have traditionally been employed to determine the scope of Fourth Amendment protection: the precautions taken to preserve privacy, the manner in which the person claiming the protection has employed the object or location searched, and applicable property rights insofar as they reflect widely-shared privacy expectations. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring).

Particularly significant has been the individual's demonstrated interest or lack of interest in assuring privacy, as evidenced by the nature of the container chosen. The very nature of unsealed paper bags and similar containers is inconsistent with a reasonable expectation that their contents will be protected from public exposure. Unlike a suitcase, footlocker, or other type of luggage, paper bags and similar packages offer at best only minimal protection against accidental or deliberate intrusion. Such items cannot be latched or secured. They are easily torn, resulting in spillage of their contents or their disclosure to public view. Indeed, their contents frequently can be discerned merely by observing, holding, or feeling them. In short, as the *Ross* panel concluded "it is doubtful that one realistically can expect a paper bag [or a container of a similar character] to remain closed or intact, its contents unrevealed,

at least if it has left its owner's hands." (App. C, *infra*, 134a). See also *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980); *United States* v. *Honigman*, 633 F.2d 1336, 1338 (9th Cir. 1980); *United States* v. *Goshorn*, 628 F.2d 697, 700 (1st Cir. 1980); *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980); 2 W. LaFave, *Search and Seizure* § 5.5, at 365 (1978).

By the same token, because paper bags and similar parcels lack the integrity, security, and privacy attributes of luggage, they are not "inevitably associated with the expectation of privacy" (*Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, quoting *United States* v. *Chadwick*, *supra*, 433 U.S. at 13) "which the law recognizes as 'legitimate.'" *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. Thus, whereas luggage or its functional equivalents—*e.g.*, briefcases, knapsacks, and duffle bags—are, by virtue of their security attributes, generally recognized as repositories for the most intimate of items, the intended and typical function of paper bags and similar containers is simply to facilitate the movement of merchandise, or to contain bulk items. Although it is true that a common grocery bag, lunch bag or similar container may at times be pressed into service as a repository for personal effects, such atypical use, without more, does not invest such containers with the protection of the Warrant Clause, for unrepresentative use is not part of the conventional "understandings that are recognized and permitted by society," which are the touchstone for assessing the scope of Fourth Amendment protection. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12.[9]

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[9] See Brief for the United States as Amicus Curiae in *Robbins* v. *California*, *supra*, at 15 n.9.

2. These considerations, which inform the decisions of the courts of appeals that permit warrantless probable cause searches of paper bags and similar containers, suggest that such searches comport with the Fourth Amendment regardless of the location in which the container is found or from which it is seized. They have special force, however, in the context of the present case. The officers had probable cause to search the trunk of respondent's automobile, but had no more specific information as to where in the trunk the contraband for which they were searching might be found. The paper bag found in the trunk was one of the places where they reasonably could expect to find that contraband. Compare *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 767-768 (Burger, C.J., concurring in the judgment). If, as is well settled, the privacy interest in an automobile is sufficiently limited that probable cause suffices to justify a warrantless search of its interior, including a locked trunk or glove compartment (*e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 48-51 (1970); *Cooper* v. *California*, 386 U.S. 58 (1967); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925)), the imposition of a warrant requirement respecting containers located in the automobile is logical only in circumstances, absent here, where those containers have substantial independent privacy attributes that require them to be given additional Fourth Amendment protection. The insubstantial character of the paper lunch bag that contained respondent's heroin cache did not meaningfully differentiate its contents from the other contents of his automobile. The nature of respondent's paper bag accordingly would not support a confident expectation that its contents would remain separate from the contents of the car

in which it had been placed. See *United States* v. *Mackey, supra*, 626 F.2d at 687; see also *United States* v. *Delos-Rios*, 642 F.2d 42, 46 (2d Cir. 1981); cf. *Arkansas* v. *Sanders, supra*, 442 U.S. at 766-768 (Burger, C.J., concurring).

3. The court of appeals voiced concern that "a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts" due to a resulting absence of comprehensible, administrable guidelines (App. A, *infra*, 4a, 24a-25a). This prediction has, however, proven unfounded. In response to this Court's mandate in *Sanders*, the lower courts have, until the advent of the decision sought to be reviewed here, distinguished with general uniformity between substantial sealed containers vested with the full privacy attributes of luggage, on the one hand, and containers such as paper bags and casually wrapped packages, on the other.[10] While no rule of law is capable of unambiguous application to the infinite variety of circumstances that may arise over time, the resulting body of law provides a serviceable and fair means of distinguishing between those instances in which a warrant is required and those where none is required.

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[10] See cases cited in Brief for the United States as Amicus Curiae in *Robbins* v. *California, supra*, at 9-10 nn.3, 5; compare also *United States* v. *Ocampo*, Nos. 80-1326 *et al.* (2d Cir. June 2, 1981) (unsealed paper bag and unzipped flight bags); *United States* v. *Delos-Rios, supra* (paper bags); and *United States* v. *Portillo*, 633 F.2d 1313 (9th Cir. 1980) (same), with *United States* v. *Medina-Verdugo*, 637 F.2d 649 (9th Cir. 1980) (gym bag); and *United States* v. *Cleary*, 645 F.2d 740 (9th Cir. 1981) (zipper bag with broken zipper).

4. If this Court affirms the judgment in *Robbins* on the ground that the container at issue in that case lacked sufficient privacy attributes to require a warrant prior to undertaking a probable cause search, it would probably follow that the decision of the court of appeals in the instant case is in error and should be reversed. On the other hand, because of the significant differences between an unsealed paper bag and a taped parcel, a reversal in *Robbins* would not necessarily control here, and might in fact make plenary consideration of this case appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624

UNITED STATES OF AMERICA

v.

ALBERT ROSS, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Criminal No. 78-698)

Argued *en banc* October 23, 1980

Decided March 31, 1981

Before MCGOWAN, *Chief Judge*, and WRIGHT, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* GINSBURG, in which *Chief Judge* MCGOWAN, and *Circuit Judges* WRIGHT, ROBINSON, WALD, MIKVA, and EDWARDS concur.

Separate opinion, dissenting in part, filed by *Circuit Judge* TAMM, in which *Circuit Judge* ROBB concurs.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

Dissenting opinion filed by *Circuit Judge* ROBB.

Dissenting opinion filed by *Circuit Judge* WILKEY.

GINSBURG, *Circuit Judge*: In *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), the Supreme Court settled the question whether police officers, in the absence of exigent circumstances, are required to obtain a warrant before opening and searching luggage, large or small, locked or unlocked, taken from an automobile properly stopped and searched for contraband. The Court held that absent a warrant, such searches violate the Fourth Amendment, even when the luggage has been lawfully seized. The case before us raises the question whether *Sanders* establishes only a "luggage rule" or whether the reasoning of that decision extends as well to other containers used to carry personal belongings and effects, containers smaller, less solid, or less durable than those on sale in a luggage shop.[1]

The two items initially in contention in this case were a closed but untaped brown paper bag and, lying alongside it in the trunk of defendant Ross's car, a zippered red leather pouch. The Government successfully opposed a motion to suppress the evi-

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[1] The Supreme Court has granted *certiorari* in two search and seizure cases involving different, but related, issues: People v. Robbins, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1980), *cert. granted*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-148); People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S. 2d 574 (1980), *cert. granted*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-328). In *Robbins*, application of the warrant exception for containers whose contents can be inferred from the packaging divided the lower court; in *Belton*, the scope of a search incident to an arrest is at issue.

dence found in both containers, heroin in the paper bag, cash in the leather pouch. Although it earlier argued that both bag and pouch were subject to warrantless search,[2] the Government, despite its success in the trial court, now concedes that the pouch is covered by the rule in *Sanders*.[3] It continues to urge, however, that a paper bag does not merit classification as a protected repository for personal effects.

We conclude that *Sanders* did not establish a "worthy container" rule encompassing bags of leather but not of paper. Rather, it appears to us that *Sanders* reaffirmed the Supreme Court's longstanding position regarding the centrality of the warrant requirement to Fourth Amendment administration: absent a "specifically established and well-delineated" exception, a warrantless search is *per se* impermissible. *Katz* v. *United States*, 389 U.S. 347, 357 (1967); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-55 (1971); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973).

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[2] Brief for Appellee at 17 n.9 (urging that *Sanders* applies only to luggage and that neither pouch nor bag "is considered luggage in the sense that luggage is commonly known").

[3] On April 17, 1980, a divided panel of this court held: 1) the currency found in the pouch should have been suppressed as evidence; 2) the Fourth Amendment does not forbid the police from opening a closed but untaped paper bag once it is properly in their hands. Had Ross "sealed the paper bag shut," however, the panel majority would have held a search warrant required. Slip op. at 15-16 n.6. The panel decision was later vacated and a rehearing en banc was held on October 23, 1980. In a brief prepared for the en banc hearing, the Government first argued that *Sanders* should not be applied retroactively. *See* pp. 6-9 *infra*. But if *Sanders* applies to this case, the brief continued, the Government does not contest that the pouch is "the type of luggage contemplated by *Sanders*." Supplemental Brief for Appellee at 7.

No specific, well-delineated exception called to our attention permits the police to dispense with a warrant to open and search "unworthy" containers. Moreover, we believe that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts.[4] For these reasons, and because the Fourth Amendment protects all persons, not just those with the resources or fastidiousness to place their effects in containers that decisionmakers would rank in the luggage line, we hold that the Fourth Amendment warrant requirement forbids the warrantless opening of a closed, opaque paper bag to the same extent that it forbids the warrantless opening of a small unlocked suitcase or a zippered leather pouch.

Part I of this opinion states the facts that give rise to this controversy; Part II deals with threshold issues the Government has raised—belated challenges to the retroactivity of *Sanders* and to Ross's standing to seek suppression of the evidence found in the paper bag; Part III concerns the scope of *Sanders* and the application of its holding and reasoning to this case.

I.

On November 27, 1978, Detective Charles Marcum of the Washington, D.C., Metropolitan Police Depart-

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[4] Similarly difficult to administer, we think, is the protection the panel majority would have accorded a person's legitimately seized paper bag sometimes. The panel majority distinguished between paper bags closed merely by folding a flap and bags sealed shut. It also distinguished the paper bag found in a car trunk "amidst suitcases" from one not surrounded by luggage. Slip op. at 15-16 n.6.

ment received a telephone call from an informant who on prior occasions had provided reliable information about narcotics trafficking. The informant told Marcum that he had observed a man known as "Bandit" selling narcotics in front of 439 Ridge Street, N.W.; he furnished a detailed description of "Bandit" and reported that the drugs were in the trunk of Bandit's automobile, a maroon two-door Chevrolet Malibu with District of Columbia license plates.

Detective Marcum, Detective David Cassidy, and Sergeant Raymon Gonzales drove to Ridge Street where they observed a car matching the informant's description. A radio check revealed that the car was registered to an Albert Ross, Jr., whose nickname was "Bandit." The police officers passed through the area twice, then spotted Ross driving the car. After stopping the vehicle and identifying themselves, the police asked Ross to step out of his car. Ross matched the description the informant had given Marcum. As Marcum conducted a body search, Gonzales observed a round of ammunition on the car's front seat. Gonzales retrieved the round, searched the inside of the car for weapons, and found a pistol in the glove compartment. Marcum arrested Ross and handcuffed him; Detective Cassidy then unlocked and searched the car's trunk. He found in it side by side a closed but unsealed brown paper sack about the size of a lunch bag and a zippered red leather pouch. Cassidy immediately opened the paper bag and discovered inside a quantity of glassine envelopes containing a white powder. Leaving the bag and the pouch in the trunk, the officers drove Ross's car to police headquarters. At the station, Cassidy reopened the paper bag, determined that it contained thirty glassine envelopes, and sent the envelopes to the police labora-

tory for analysis; the laboratory later reported that the envelopes contained heroin. Cassidy also opened the leather pouch and found inside $3200 in currency. At no point in the episode did the officers seek a search warrant.

On December 19, 1978, a federal grand jury in the District of Columbia indicted Ross for possession of heroin, possession of heroin with intent to distribute, carrying a pistol without a license, and possessing a firearm after a felony conviction. Ross moved to suppress the evidence obtained from the search of the paper bag and the leather pouch. After a hearing, the district judge denied the motion. A jury trial followed and, on March 21, 1979, Ross was convicted of possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a).

II.

(A)

Although the Government did not raise the point before the panel, it argues here that *Arkansas* v. *Sanders* should not apply retroactively. In *United States* v. *Peltier*, 422 U.S. 531, 535 (1975), the Supreme Court reiterated that decisions expanding the scope of the exclusionary rule should have prospective effect only. A court should not apply a decision retroactively if the "law enforcement officials [who conducted the search] reasonably believed in good faith that their conduct was in accordance with the law" in effect at the time of the search. *Id.* at 538 (emphasis deleted). If, however, a decision does not expand the exclusionary rule, but merely restates and applies doctrine already in place, then law enforcement officers must be charged with knowledge of that

doctrine before the explanative decision issues. The Supreme Court in *Sanders* indicated that no new constitutional principle was at stake. On the contrary, the Court styled its opinion as a recapitulation of the theme exposed in *United States* v. *Chadwick*, 433 U.S. 1 (1977). Therefore we cannot seek refuge in *Peltier* to justify a declaration that *Sanders* commands only prospective adherence.

Justice Powell's opinion for the Court in *Sanders* signals that the decision, affirming the judgment of the Supreme Court of Arkansas, breaks no new ground. The opening paragraph announces a purpose to elaborate, not to alter, existing doctrine: "We took this case . . . to resolve some apparent misunderstanding as to the application of our decision in *United States* v. *Chadwick* . . . ." 442 U.S. at 754. Summing up in *Sanders*, Justice Powell declared that the Court found "no justification for the extension of [*Carroll* v. *United States*, 267 U.S. 132 (1925)] and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police." *Id.* at 765. Justice Powell, therefore, indicated that a majority of the Court believed that a decision contrary to the one reached in *Sanders*, rather than the one there made, would have altered prior law.[5]

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[5] Judge Wilkey's dissenting opinion, *post*, at 17-22, urges that the Supreme Court's opinion in *Peltier* precludes this court from asking whether *Sanders* declared new law. It is true that the Court in *Peltier* did not set out this consideration as a separate inquiry, directing the courts instead to ask whether the police officer knew or should have known that his conduct was in accordance with the law. We believe, however, that the former inquiry is subsumed in the latter. If a decision develops no new law, then the police officer—who is charged with knowledge of the old law—should have known, and acted in a manner consistent with, the core doctrine.

Between *Chadwick* and *Sanders*, moreover, at least four courts held that *Chadwick* rendered unlawful the warrantless search of luggage seized from a car.[6] These rulings contrast with pre-*Chadwick* decisions, which held consistently that no warrant was required to search luggage seized from a car.[7] The shift in the trend of lower court decisions after *Chadwick* thus anticipated the Supreme Court's signification in *Sanders* that *Chadwick*, not *Sanders*, was the path-marking decision.

For these reasons we conclude that *Arkansas* v. *Sanders* did not augment, but simply explained and applied, doctrine welded in place since *Chadwick*—doctrine that Detective Cassidy knew or should have known when he searched the containers found in the truck of Ross's car. We therefore reject the Government's belated argument and join the numerous courts that have held *Sanders* retroactively applicable at least to searches conducted after *Chadwick*.[8] *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *adhered*

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[6] United States v. Stevie, 582 F.2d 1175 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979); United States v. Vallieres, 443 F. Supp. 186 (D. Conn. 1977); Sanders v. State, 262 Ark. 595, 559 S.W.2d 704 (1977), *aff'd sub nom.* Arkansas v. Sanders, 442 U.S. 753 (1979); Shingleton v. State, 39 Md. App. 527, 387 A.2d 1134 (1978). Indeed, the Court in *Sanders* noted that the Supreme Court of Arkansas had found *Chadwick* "virtually controlling" on the questions *Sanders* presented. 442 U.S. at 762.

[7] *See, e.g.*, United States v. Tramunti, 513 F.2d 1087, 1104-05 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); United States v. Soriano, 497 F.2d 147 (5th Cir. 1974) (en banc); United States v. Evans, 481 F.2d 990, 993-94 (9th Cir. 1973).

[8] *Chadwick* was decided on June 21, 1977. The searches in this case occurred on November 27, 1978. *Sanders* was decided on June 20, 1979.

to on petition for rehearing, 615 F.2d 10 (2d Cir. 1980); *United States* v. *Medina-Verdugo*, No. 637 F.2d 649 (9th Cir. 1980); *United States* v. *MacKay*, 606 F.2d 264 (9th Cir. 1979); *State* v. *White*, 94 N.M. 687, 615 P.2d 1004, 1006 (Ct. App. 1980) (argument that *Sanders* does not apply retroactively is "spurious"; *Abell* v. *Commonwealth*, No. 800354 (Va. Nov. 26, 1980); *cf. United States* v. *Bulgier*, 618 F.2d 472 (7th Cir.) (assuming retroactive application of *Sanders* and upholding search), *cert. denied*, 101 S. Ct. 125 (1980). *But cf. State* v. *Hatami*, No. A-1567-77 (N.J. Super. Ct. App. Div. Nov. 21, 1979) (per curiam) (unpublished opinion) (refusing to apply *Sanders* retroactively to a pre-*Chadwick* search), *certification denied*, No. C-391 (N.J. Feb. 11, 1980), *cert. denied*, 101 S. Ct. 610 (1980).

We note, finally, that doubt some courts and commentators expressed, in the wake of *Chadwick*, about whether the police needed a warrant to search closed containers seized from a car, cannot justify Detective Cassidy's failure to obtain a search warrant before opening the paper sack and leather pouch found in Ross's car. The Supreme Court has firmly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). That declaration indicates doubts police officers may entertain are to be resolved in favor of, not against, the main rule that a warrant precede a search. We cannot invert the Supreme Court's instructions by sanctioning police conduct of warrantless searches, subject only to the courts' prior express mandate that they obtain a warrant. Rather,

we are required to adhere to the Court's command that the police obtain a warrant unless their search falls within one of the express and narrowly drawn exceptions to the warrant requirement. Read against this background, the Court's statement in *Peltier*, that a retroactivity ruling is impermissible when a police officer believes "in good faith" that his conduct is "in accordance with the law," 422 U.S. at 538, must mean that Detective Cassidy had to believe, in good faith, that his conduct fell within one of the few, jealously drawn exceptions to the warrant requirement. In sum, if Detective Cassidy had doubts about the meaning of *Chadwick*, he should have followed the presumption laid down in numerous Supreme Court decisions and obtained a warrant.[9] His doubts, even after *Peltier*, should not have been resolved against the warrant requirement.[10]

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[9] Judge Tamm expresses this point admirably in his opinion dissenting in part: "In any situation approaching a borderline case, the police would best be cautious, and obtain a proper search warrant before proceeding." *Post*, at 14 n.6.

[10] In *Peltier*, by contrast, the Court found that roving border patrol searches had received "continuous judicial approval" before Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the decision that was there denied retroactive effect. 422 U.S. at 541. Justice Powell's opinion for the Court in *Almeida-Sanchez* had recognized that these searches "ha[d] been consistently approved by the judiciary" and presented a "question . . . of first impression" to the Supreme Court, 413 U.S. at 278, *quoted in Peltier*, 422 U.S. at 541. Police officers conducting roving border patrol searches before *Almeida-Sanchez*, therefore, did not have doubts about the constitutionality of their conduct; that conduct had been consistently approved by the federal courts. As explained above, however, *Chadwick* and the lower court decisions following it must have at least created a substantial doubt about the constitutionality of warrantless searches of closed containers seized from automobiles.

(B)

A second preliminary issue not previously raised by the Government concerns Ross's "standing." In contrast to its position regarding *Sanders*, the Government here champions retroactivity, specifically, the retroactivity of the Supreme Court's decision in *United States* v. *Salvucci*, —— U.S. ——, 100 S. Ct. 2547 (1980).

When Ross moved to suppress the evidence obtained from the search of the pouch and bag, and when his case was tried, the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), governed lower courts. Under *Jones*, a defendant charged with a crime of possession was entitled to claim "automatic standing" to challenge the legality of a search that produced evidence against him. Ross therefore did not testify at the suppression hearing and the Government raised no objection to his silence.

The Government's evidence at trial was substantially the same as the evidence it presented at the hearing on the motion to suppress. The police described the circumstances surrounding the arrest of Ross, including the attendant searches of the pouch and bag. Having lost the suppression motion, Ross defended a trial by denying knowing anything about packets of narcotics in a paper bag in the trunk of his car.

After the initial hearing and decision of this appeal [11] the Supreme Court overruled *Jones* v. *United States*. In *United States* v. *Salvucci*, —— U.S. ——, 100 S. Ct. 2547 (1980), the Court held that defendants charged with crimes of possession may claim the benefits of the exclusionary rule only if they first es-

[11] *See* note 3 *supra*.

tablish that their own Fourth Amendment rights have been violated. Relying on *Salvucci*, the Government now asserts for the first time that Ross, by his tactic at trial, coupled with his silence at the suppression hearing, forfeited any claim that his own Fourth Amendment rights were violated. Ross's professed ignorance of the narcotics-filled paper bag in his trial testimony, the Government argues, pinions him. He cannot now be heard to claim that he secreted the bag in the trunk, hence he cannot satisfy the *Salvucci* requirement.

But the Supreme Court in *Salvucci* did not rule that *Jones* was overruled retrospectively. In fact, the Court noted that *Jones* bound the lower courts until it said otherwise. —— U.S. at ——, 100 S. Ct. at 2550. In contrast to *Sanders*, which was a confirming and clarifying decision, *Salvucci* was a forthright overruling of prior High Court precedent.[12]

In *Salvucci* itself the Government had challenged the defendant's "standing" from the start. No such challenge was raised in the case before us. We decline to transform this case into the "Catch-22" the Government proposes. Had the Government raised a standing question at the suppression hearing, Ross and his counsel would have been alerted to the risk of Ross's remaining silent and failing to assert that both pouch and bag were items under his exclusive posses-

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[12] Under the criteria set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 105-07 (1971), *Salvucci* should not apply retroactively to cases on direct appeal where the prosecution failed to challenge the defendant's "standing" at the suppression hearing. While *Chevron* was a civil case, its reasoning is fully applicable in this context. United States v. Bowen, 500 F.2d 960, 975 n.1 (9th Cir. 1974) (en banc), *aff'd*, 422 U.S. 916 (1975). *See also* Linkletter v. Walker, 381 U.S. 618, 627 (1965).

sion and control until he encountered the police. More significant in view of the context in which the case comes to us, had the district court granted the suppression motion, as we believe it should have, there would have been no trial and no testimony from Ross denying knowledge of the bag found in his trunk.

The unfairness of now saddling Ross with the rule in *Salvucci* rather than the one in *Jones* is evident.[13] Ross's positions, his silence at the suppression hearing and his testimony at trial, should not be judged by a rule that did not exist until after his hand had been fully played. We therefore hold that *Jones*, not *Salvucci*, provides the "standing" rule that governs this case.

Moreover, even if Ross's standing were not to be determined under the *Salvucci* test, we could not accept the Government's position that his trial tactic, denying knowledge of the bag, strips him of Fourth Amendment protection. The jury found Ross guilty beyond a reasonable doubt. To make that determination the jury necessarily concluded that the narcotics-filled bag belonged to Ross. To reach that conclusion, the jury had to reject Ross's attempt at trial to suggest that someone else might have placed the bag in the trunk of the car. The jury's verdict, we believe, resolves any issue whether the bag belonged to Ross—it did. In view of the jury determination, the Government cannot argue sensibly that the bag was Ross's for purposes of the conviction, but someone else's for Fourth Amendment purposes.

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[13] *See* Cipriano v. City of Houma, 395 U.S. 701, 706 (1969). Even the Government backs away, finding it "understandable" that Ross did not forecast *Salvucci* while his case was before the district court. Supplemental Brief for Appellee at 12 n.6.

It may be, however, that in emphasizing Ross's trial testimony, the Government does not seriously challenge Ross's exclusive control and possession of the narcotics-filled bag prior to his apprehension by the police. Rather, the Government may be asserting that standing requires an expectation of privacy, which Ross's trial testimony, "There wasn't supposed to be no paper bag in [the car trunk]," defeats. But given the jury verdict, we must take it to be fact that there was supposed to be a paper bag in the trunk and Ross put it there. The Government now concedes that Ross had an adequate expectation of privacy in the currency-filled pouch. We find it difficult to comprehend why that same expectation would not attend a contraband-filled closed container Ross secreted in the locked trunk alongside the pouch.[14]

III.

Turning to the application of Supreme Court precdent in point, most immediately, *Arkansas* v. *Sanders*, we find only two arguable bases for the warrantless searches of Ross's pouch and bag. First, in *Sanders*, as in *Chadwick*, police suspicion related to the containers, not to the vehicles in which they were placed. In this case, the informant told the police that Ross had narcotics in the trunk of his car. No specific container was identified. Conceivably, we could distinguish those cases in which the police focus their suspicion on the container from those in which the vehicle or an integral part of it attracts police attention.[15] Second, *Chadwick* and *Sanders* might be

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[14] *See* text at pp. 23-24 and notes 31, 33, and 34 *infra*.

[15] *Cf.* Arkansas v. Sanders, *supra*, 442 U.S. at 766-68 (Burger, C.J., concurring).

cubbyholded as luggage cases, decisions applying the Fourth Amendment warrant requirement to effects placed in durable containers, with no carryover to effects put in less stable packets.

As we explain further below, we believe the first of these two bases is precluded by the Court's statement of the "misunderstanding" it sought to resolve in *Sanders*. Moreover, we note that the Government does not urge that we distinguish searches based on police suspicion directed to a vehicle or an integral part of it, from those in which suspicion focuses on a particular container carried in the vehicle. For such a distinction, applied to this case, would render the pouch as vulnerable to warrantless search as the bag, and the Government now concedes that under the *Sanders* decision, a warrant is prerequisite to exposing the contents of the pouch.

The second basis is pressed by the Government and has attracted several courts.[16] But just as the Su-

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[16] *E.g.*, United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (plastic bag); United States v. Mackey, 626 F.2d 684 (9th Cir. 1980) (paper bag); United States v. Blair, 493 F. Supp. 398, 416 (D. Md. 1980) (cardboard boxes). *Cf.* United States v. Brown, 635 F.2d 1207 (6th Cir. 1980); United States v. Jimenez, 626 F.2d 39, 41 (7th Cir. 1980) (no expectation of privacy in paper bag on facts of this case, but facts in another case could show such an expectation), *petition for cert. filed*, 49 U.S.L.W. 3429 (U.S. Nov. 20, 1980) (No. 80-817); United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) (remand for evidence whether defendant had expectation of privacy in paper bags). Several of the recent decisions distinguishing containers more or less closely resembling luggage (purses, wallets, guitar cases) from plastic or paper sacks cite the analysis in the now vacated panel decision in this case, which distinguished leather pouch from paper bag.

preme Court was unable to tie to the Fourth Amendment warrant requirement any "established, well-delineated" exception for luggage, we are unable to perceive such an exception for packets less resistant than luggage to hard wear and frequent use.

We discuss below in more detail each of the two possible bases for reading out of this case the Fourth Amendment warrant requirement.

(A)

In *Sanders*, local police received a tip that a passenger on a designated flight due in at the municipal airport would be carrying a small green suitcase containing marijuana. The police observed the passenger's departure from the terminal, green suitcase in tow, and the placement of the suitcase in the trunk of a taxicab. The taxi drove off and was stopped by pursuing officers several blocks from the terminal. At police request, the taxi driver opened the trunk. The police then seized the green suitcase, which was unlocked, opened it, and found inside ten marijuana packets. The Supreme Court affirmed the decision of the Supreme Court of Arkansas holding that the trial court should have suppressed the marijuana because it was obtained through an unlawful search of the suitcase.

The Court granted certiorari in *Sanders* to resolve "some apparent misunderstanding" among lower courts about the application of *United States* v. *Chadwick*, 433 U.S. 1 (1977).[17] *Chadwick* held that a footlocker placed in the trunk of an automobile parked at a curb could lawfully be taken into police custody, because the police had probable cause to believe it con-

[17] 442 U.S. at 754.

tained contraband, but could not lawfully be searched without a warrant. To illustrate the post-*Chadwick* misunderstanding among lower courts, the Supreme Court cited *United States* v. *Finnegan*, 568 F.2d 637, 641-42 (9th Cir. 1977), and *United States* v. *Stevie*, 582 F.2d 1175, 1178-79 (8th Cir. 1978) (en banc), *cert. denied*, 443 U.S. 911 (1979).

In *Finnegan*, the car, not a particular container in it, originally attracted police attention.[18] In *Stevie*, the police suspicion related to baggage placed in a car, not to the vehicle in which the luggage was carried.[19] The Ninth Circuit panel in *Finnegan* reasoned that *Chadwick* was inapplicable when car rather than container was the object of suspicion. Instead, the *Finnegan* court held, *Chambers* v. *Maroney*, 399 U.S. 42 (1970), controlled. *Chambers* upheld the "automobile exception" to the warrant requirement; it sustained the constitutionality of a warrantless search of a vehicle on a street or highway when the police have probable cause to believe the vehicle contains contraband or evidence of crime. The *Finnegan* court

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[18] The car had been stopped for speeding. A patrol officer approached the car window and saw in plain view a large amount of currency and a gun case. The officer arrested the driver, removed the currency, opened the gun case, which contained a pistol and two fully-loaded clips, and further observed a suitcase in the hatchback. He then opened the suitcase and found incriminating evidence in it. 568 F.2d at 639.

[19] The police, engaged in surveillance for narcotics trafficing, had observed two incoming passengers at an airport, saw them load luggage into a rented station wagon, stopped the vehicle on the highway, arrested the occupants, looked for their luggage, and opened a suitcase found in the rear area of the station wagon. Inside were wrapped bricks of a substance later determined to be marijuana. 582 F.2d at 1176-77.

pointed out that if *Chadwick*, not *Chambers*, applied, then police could search without a warrant for a brick of marijuana lying inside a car trunk, but not for one inside a suitcase in the trunk. 568 F.2d at 641. *Stevie*, on the other hand, held *Chadwick* dispositive; in so ruling, the Eighth Circuit stated explicitly that it disagreed with the reasoning of the Ninth Circuit panel in *Finnegan*. 582 F.2d at 1179.

The Supreme Court identified *Finnegan* and *Stevie* as inconsistent decisions and it sought in *Sanders* to resolve the inconsistency. It seems apparent, therefore, that the *Sanders* majority did not believe the compatibility of the search with the Fourth Amendment should turn on whether police suspicion related to the car (as in *Finnegan*) or to the container (as in *Stevie*). We cannot treat the *Finnegan-Stevie* citations in *Sanders* as idle or haphazard.[20] We must accept the clear implication of *Sanders: Stevie* was correctly decided; *Finnegan* incorrectly applied *Chambers* rather than *Chadwick*.

In *Sanders*, police suspicion related to the suitcase itself. In the case before us, the car trunk, not any identified container in it, was suspected of carrying contraband. But the Supreme Court's disapproval of *Finnegan* controls our analysis. Where a container legitimately seized from a car trunk is searched without a warrant, *Sanders* precludes different outcomes when the container is suspected of housing contraband, and when the car itself is the object of sus-

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[20] Nor does the Ninth Circuit, which now applies *Sanders* whether suspicion is focused on a particular piece of luggage or on the car in general. United States v. Medina-Verdugo, 637 F.2d 649, 652-53 (9th Cir. 1980).

picion.[21] We therefore conclude that, in this case, if a small suitcase had been removed from the trunk of Ross's car, and thereafter searched without obtaining a warrant, *Sanders* would mandate suppression of incriminating evidence found in the suitcase. The Government does not contest that conclusion, nor does it contest that it applies as well to the evidence seized in this case from the leather pouch. Supplemental Brief for Appellee at 7. Accordingly, the sole question we must determine is whether the Fourth Amendment protection cloaking an unlocked small suitcase and a zippered leather pouch stops short of a closed but unsealed paper bag.

(B)

Before addressing whether *Sanders* envisions and the Fourth Amendment tolerates a warrant rule covering small suitcases and pouches but not paper bags, we set out facets of this case the parties do not seriously dispute. Based on the tip the police received,[22]

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[21] Even if *Sanders* did not itself compel such a result, we would question the administrative feasibility of a distinction based on whether the object of suspicion is the car or the container. In some cases, for example, when an informant has supplied a precise tip, the object of suspicion may be clearly defined. But in many cases, an officer derives probable cause from the totality of the circumstances, after observing a vehicle's movements and appearance, the demeanor and activties of its occupants, and the placement, transfer, or removal of containers to or from the vehicle. In such cases, it would demand too much to require the officer, after determining the existence of probable cause, to make the further assessment whether the car or the container is the "object of suspicion."

[22] Ross argued before the three-judge panel that the police lacked probable cause to stop and search his car, but he has not pressed that objection before the full court. At any event,

Ross's car was properly stopped and searched, and the pouch and bag were properly seized. However, no "special exigencies" [23] justified opening the pouch or the bag without a warrant: both containers were securely removed from Ross's reach at the time of the seizure; the police entertained no belief that the containers or their contents endangered their personal safety; with the pouch and bag in police possession there was no risk that evidence would be lost or destroyed before a warrant could be obtained. *Cf. People* v. *Belton*, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980) (warrantless search of jacket pockets may not be upheld as search incident to arrest once object is within the exclusive control of the police), *cert. granted*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-328).

Also beyond serious question is the coherent position the Supreme Court has elaborated with respect to the warrant requirement. The reasonableness of a search in light of the surrounding circumstances does not obviate the need for a warrant. *Sanders*, 442 U.S. at 758. On the contrary, the warrant requirement affords protection separate and distinct from the protection against unreasonable searches. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*,

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we believe it clear that the police had ample and reasonable cause to stop Ross and to search his car. The informer had supplied accurate information on prior occasions, and he was an eyewitness to sales of narcotics by Ross. He said he had just seen Ross take narcotics from the trunk of his car in making a sale and heard him say he possessed additional narcotics. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Davis, 617 F.2d 677, 692-93 (D.C. Cir. 1979).

[23] *Sanders*, 442 U.S. at 763-64 n.11.

58 Minn. L. Rev. 349, 358-60, 374, 395 (1974). Whether or not the search would be "reasonable," the warrant requirement operates "as a matter of course." *Sanders*, 442 U.S. at 758 (quoting from *Coolidge* v. *New Hampshire*, 403 U.S. at 481):

> In the ordinary case . . . a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment. . . .
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> > "The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement."

Sanders reiterated that exceptions to the warrant requirement are few in number, jealously guarded, and carefully delineated. 442 U.S. at 759-60. We discern no established, well-drawn exception covering the opening of pouch or bag in this case. True, precedent fully supports stopping Ross's vehicle and seizing the pouch and bag. But the "automobile exception" [24] invoked to justify stopping the car and placing

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[24] Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970). *See generally* Moylan, *The*

items found in it under police control cannot be stretched to encompass the warrantless openings.[25] The automobile exception rests on the inherent mobility of motor vehicles and the "severe," sometimes "impossible" burdens police departments would encounter were they required to place at every officers beck and call "the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured." *Sanders*, 442 U.S. at 761, 765-66 n.14. However, the pouch and bag with which we deal were immobilized by police seizure; it was hardly burdensome to carry them unopened to a magistrate. In short, with respect to inspecting the contents of pouch and bag, the police in this case were saddled with no burden other than the inconvenience obtaining a warrant imposes in any case.

Nor is it arguable that the search of pouch or bag was permissible as incident to an arrest. At nc time after the car was stopped were the pouch and bag within Ross's immediate control. There was not the slightest danger that Ross or anyone other than the

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Automobile Exception: What it is and What it is not—A Rationale in Search of a Clearer Label, 27 Mercer L. Rev. 987 (1976); Note, *The Automobile Exception to the Warrant Requirement: Speeding Away from the Fourth Amendment*, 82 W. Va. L. Rev. 637, 637-56 (1980).

[25] As *Sanders* indicated, 442 U.S. at 763, the exception has been applied by the Court to integral parts of an automobile but not to items separately contained and temporarily stored in a car. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976) (glove compartment); Texas v. White, 423 U.S. 67 (1975) (passenger compartment); Cady v. Dombrowski, 413 U.S. 433 (1973) (trunk); Chambers v. Maroney, *supra* (concealed compartment under the dashboard); Carroll v. United States, *supra* (behind the upholstering of the seats).

police would remove the contents of the containers before a warrant could be obtained. A delay in opening the pouch and bag pending appearance before a magistrate would not have jeopardized the safety of the police or the public. *See Sanders*, 442 U.S. at 763-64 n.11; *cf.* Amsterdam, *supra*, 58 Minn. L. Rev. at 412-14.[26]

Since no exception to the warrant requirement thus far delineated by the Supreme Court covers this case, the prosecution asks, in essence, that we delineate a new one. On the facts before us, it appears certain that the police could have obtained a warrant had they applied to a magistrate before opening the seized items. But surely an exception to the warrant requirement cannot rest on a post hoc judgment that a warrant would have been granted if one had been requested. *See Sanders*, 442 U.S. at 764 n.12 (reasonableness of search, coupled with inconvenience of approaching a magistrate, does not justify dispensing with a warrant). Rather, the argument appears to be that some containers are fair game once they are seized because they are too small, too insecure, or too cheaply made to burden the time of a magistrate.

The fine distinctions into which the police and the courts would be drawn were we to adopt an "unworthy container" rule are apparent.[27] Size could not be the dividing line, nor does the Government contend otherwise given its concession that the leather pouch

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[26] The Government does not contend, nor could it plausibly, that the officers were engaged in an "inventory search." *Cf.* South Dakota v. Opperman, 428 U.S. 364 (1976).

[27] *Cf.* Amsterdam, *supra*, 58 Minn. L. Rev. at 403 ("[I]n the first and most important instance the fourth amendment speaks to the police and must speak to them intelligibly.").

is encompassed by *Sanders*. A priceless bequest, great grandmother's diary, for example, could be carried in a sack far smaller than one accommodating jogging suit and sneakers. And if quality of material is what counts, on what side of the line would one place the variety of parcels people carry? Are police to distinguish cotton purse from silk, felt, vinyl, canvas, tinfoil, cardboard, or paper containers from leather; sacks closed by folding a flap from those closed with zippers, drawstrings, buttons, snaps, velcro fastenings or strips of adhesive tape? Would a Tiffany shopping bag rank with one from the local supermarket? [28]

The point need not be labored further. Not only would an "unworthy container" rule fail to supply an "easily understood and administered" guide for the police,[29] it would suffer from infirmities more critical than administrative infeasibility. It would snare those without the means or the sophistication to use worthy containers.[30] And, most importantly, it would

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[28] In addition to the value or sturdiness of a container and the way in which it is closed, the panel majority in this case suggested another variable: an unimposing container—a paper bag—might not be subject to warrantless opening if the police found it "amidst suitcases." Slip op. at 15-16 n.6. The paper bag in this case was found in the car trunk alongside a pouch that the Government now ranks as luggage. Would one luggage-like adjacent container suffice to upgrade the paper bag or would the bag remain vulnerable to on the spot warrantless search unless surrounded by several pieces of baggage?

[29] *See* United States v. Rivera, 486 F. Supp. 1025, 1034 (N.D. Tex. 1980).

[30] *Cf.* The Washington Post, Dec. 15, 1980, at C1. col. 3 (reporting that Arlene Robinson and her six children, aged 4 to 12, homeless and on welfare, "have lived a hand-to-mouth

destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant.

Sanders, it seems to us, did not leave the matter in large doubt. The Court there indicated when the nature of the container would justify immediate search: "[S]ome containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases, the contents of a package will be open to 'plain view,' thereby obviating the need for a warrant." 442 U.S. at 765 n.13. Those guides, we think are comprehensive, administerable, and consistent with the Supreme Court's stress on the centrality of the warrant requirement to Fourth Amendment enforcement.

Ordinarily, one cannot infer from the density, shape, or size of a leather pouch or opaque paper bag what is inside,[21] and this case presents no exception. The Government does not assert that the very apperance or feel of the paper bag seized from Ross's

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existence, mostly on the streets of Washington, with their few belongings stuffed into paper shopping bags").

[21] Neither police nor court, consistently with the Fourth Amendment, can reason backward to determine that no warrant was required if the container searched in fact concealed evidence of crime. Similarly, as to the reasonableness of a privacy expectation, the innocence or evil of the goods concealed cannot determine Fourth Amendment protection. *See* United States v. Rivera, *supra*, 486 F. Supp. at 1031-32, 1034. One has no greater or lesser expectation of privacy in a bag when it contains drugs prescribed by a physician for an embarrassing ailment than when it contains contraband. *Cf.* United States v. Taborda, —— F.2d ——, No. 80-1251, slip op. at 6483-84 n.10 (2d Cir. Nov. 24, 1980).

car trunk suggested its contents.[32] Nor does the Government argue that the contents of the bag were in "plain view" or that Ross willingly displayed what his sacks carried.[33] The means that Ross employed to store the contents of pouch and bag, it seems to us, were calculated to secure the privacy of his possessions against intrusion by members of the public.[34]

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[32] *Cf.* United States v. Sanders, No. 79-1661 (8th Cir. Aug. 15, 1980) (contents of a 2½ by 3 inch brown manila packet could be inferred from its outward appearance where agents knew that such packets were frequently used to carry cocaine or heroin, the packet was well-worn, and part of it was torn off); People v. Robbins, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1980) (holding 2-1 that contents of "green wrapped plastic blocks" could be inferred from outward appearance), *cert. granted*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-148).

[33] Situated as they were in the locked car trunk, the pouch and bag surely were not knowingly expose[d] to the public." *See* Katz v. United States, 389 U.S. 347, 351-52 (1967); *cf.* Note, *Warrantless Searches and Seizures of Automobiles*, 87 Harv. L. Rev. 807, 840 n.29 (1974). Placement of the closed sacks inside the locked trunk sufficiently exhibited Ross' reasonable expectation that others would not peer or pry into his belongings. *Cf.* United States v. Taborda, *supra*, slip op. at 6479-84; United States v. Rivera, *supra*, 486 F. Supp. at 1031-34; Note, *Tracking* Katz: *Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. 1461, 1472-77 (1977) (indicating that the concept "expectation of privacy" in Fourth Amendment cases is less than fully coherent, has produced confused and unprincipled decisions, and is in need of further Supreme Court attention and explication).

[34] *See* Yale Note, *supra* note 33, at 1482. Judge Tamm's opinion dissenting in part, *post*, at 13, distinguishes paper bags from luggage partly on the basis that a paper bag, once out of its owner's possession, is more susceptible to invasions by the curious or the dishonest. In this regard, we see no significant difference between the vulnerability of an unlocked suitcase, pouch, or wallet and that of a folded paper bag.

In summary, we cannot sanction the warrantless searches in this case without distorting the reasoning and diminishing the holding in *Sanders*. Nor can we distinguish between pouch and bag in a manner that makes theoretical or practical sense. We therefore conclude that "[w]here—as in the present case—the police without endangering themselves or risking loss of the evidence," lawfully have stopped a car, detained any person in it suspected of criminal activity, and secured parcels found in the car, they must delay search of the parcels "until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected." *Sanders*, 442 U.S. at 766.

IV.

Because Ross's conviction rested on evidence the police obtained through unlawful searches of the leather pouch and paper bag seized from his car trunk, the conviction is reversed and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

TAMM, *Circuit Judge, dissenting in part*: The opinion for the court suggests that my learned colleagues of the majority are sensitive to theory but insentive to reality. It is a basic responsibility of appellate courts stating the principles of constitutionally guaranteed rights to give, as precisely as possible, practical guidance both to trial courts and law enforcement officers. I feel that my colleagues of the majority, with particular reference to their ruling on the paper bag, are descending from disarray to chaos.

With this case we must decide whether law enforcement officers must obtain a search warrant before opening a closed paper bag or a closed leather pouch lawfully seized from the trunk of an automobile that the officers have probable cause to believe contains narcotics. I conclude that under the circumstances of this case, the defendant did not have a reasonable expectation of privacy in the contents of the paper bag once the bag was in police hands; the warrantless search of the paper bag, therefore, was permissible. A pouch, however, is a form of luggage and the police must have a warrant to search such an item. Because the conviction of the defendant in this case rested on evidence obtained from both containers, I would reverse that conviction and remand for a new trial at which items taken from the paper bag, but not from the leather pouch, may be admitted.

I

Ross's initial argument is that the police lacked probable cause to stop and search his car.[1] I disagree. Under *Aguilar* v. *Texas*, 378 U.S. 108 (1964),

[1] The majority opinion accurately sets out the relevant facts of this case. *See* majority op. at 4-6.

and *Spinelli* v. *United States*, 393 U.S. 410 (1969), probable cause may be based on the information supplied by an informant if the informant was credible and he obtained his information in a reliable way. *See United States* v. *Davis*, 617 F.2d 677, 693 (D.C. Cir. 1979). One method of discovering an informant's credibility, that is, his truthfulness, is to examine his "track record" in providing police with accurate information. *Id. See Aguilar v. Texas*, 378 U.S. at 114 n.5. Here, undisputed testimony indicates the officers knew that this informant had supplied accurate information on prior occasions. Moreover, there is no challenge to the method in which the informant came upon his information: he was an eyewitness to actual sales of narcotics. Under these circumstances, I believe it clear that the police had probable cause to stop Ross and to search his car.

II

Not only did the police have the necessary probable cause, but under *Carroll* v. *United States*, 267 U.S. 132 (1925), and *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the officers lawfully could search Ross's automobile, including its trunk, without a warrant. *See United States* v. *Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979). *But cf. United States* v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980) (inventory search of locked automobile trunk held unreasonable). My only concern, then, is with the permissbility of the warrantless search of the containers they found in the trunk.

The fourth amendment dictates that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance

with the Warrant Clause." *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). A search warrant represents more than a formality or technicality. "The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id. See United States* v. *Chadwick*, 433 U.S. 1, 8 (1977); *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948). Moreover, the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare, and that the few recognized exceptions must be "jealously and carefully drawn . . . ." *Jones* v. *United States*, 357 U.S. 493, 499 (1958). *See also United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).

Analysis of fourth amendment protection begins with the person making claim to that protection. Fourth amendment rights are not intrinsic attributes of a container or any other object. Instead, "rights assured by the Fourth Amendment are personal rights . . . [that] may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons* v. *United States*, 390 U.S. 377, 389 (1968), *quoted in Rakas* v. *Illinois*, 439 U.S. 128, 138 (1978). *Accord, Alderman* v. *United States*, 394 U.S. 165, 174 (1969). The defendant must establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). *See id.* at 130 n.1.

To test whether the police officer's search of either the paper bag or the leather pouch invaded interests of Ross protected by the fourth amendment, I look to the expectation-of-privacy standard first enunciated in *Katz* v. *United States*, 389 U.S. 347 (1967),

especially Justice Harlan's concurrence, *id.* at 360-62. *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Rakas* v. *Illinois*, 439 U.S. at 143. An interest is protected if two elements are present. First, as a subjective aspect, the defendant actually must have expected the preservation of his privacy. *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring). Thus if the accused intentionally displayed the contents of his automobile to the police, he obviously did not expect the contents to remain hidden from police view. *See id.* at 351 (majority opinion). Second, as an objective aspect, the defendant's expectation must be one that society is prepared to recognize as reasonable. That is, the defendant must have relied justifiably on a freedom from government intrusion. *Id.* at 361 (Harlan, J., concurring).

In most cases, the extent of expectation that is reasonable will depend upon the circumstances at the time of the search. The Supreme Court has taken several factors into account: the precautions taken to preserve privacy, the manner in which the person claiming fourth amendment protection has used the place or item searched, the treatment accorded that place or item at the time the Framers adopted the fourth amendment, and finally, the applicable property rights. *See Rakas* v. *Illinois*, 439 U.S. at 152-53 (Powell, J., concurring) (summarizing earlier cases). For example, a lower expectation may be justified when the defendant no longer possesses the searched item. Both the majority and the dissent in *Rakas* acknowledged that "perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place." *Id.* at 166 (White, J., dissenting), *quoted with approval in id.* at 146-47 (majority

opinion). Similarly, the Supreme Court has held in automobile cases that the characteristics of cars, the manner of their use, and the degree of their regulation dilute the justifiable expectation of privacy. *See Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). *Accord, Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).

In this case, however, we are not dealing with the search of a car but with the search of two containers. Our inquiry must focus on the reasonable expectation of privacy Ross had in the paper bag and the leather pouch. The contents of some containers, those the Supreme Court refers to as "common repositor[ies] for personal effects," are entitled to an expectation of privacy regardless of their location or the right to possess them. *Arkansas* v. *Sanders*, 442 U.S. 753, 763-66 (1979). Luggage, such as a footlocker or a suitcase, "is *inevitably* associated with the expectation of privacy." *Id.* at 762 (emphasis added). Because society recognizes luggage as a personal sanctuary, its presence within a car or its having fallen lawfully into public hands does not alter the reasonableness of an expectation that it will not be opened by the police. *Id.*; *Rakas* v. *Illinois*, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). Professor Wayne LaFave has observed that "[i]n *Chadwick*, the Court was able to say that the 'substantial infringement with respondents' use and possession' of the footlocker, justified by exigent circumstances, 'did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.'" 2 W. LAFAVE, SEARCH AND SEIZURE, §5.5, at 365 (1978) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 13 n.8 (1977)). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*). *Cf. Penn-*

sylvania v. *Mimms*, 434 U.S. 106 (1977) (per curiam) (Court examines the legality of ordering the driver of a stopped vehicle out of his car by looking to the incremental invasion of privacy, given the stop).

The same circumstances that justified the search of Ross's automobile also justify a warrantless seizure of the paper bag and leather pouch, thereby depriving Ross of some of his possessory rights, at least temporarily. Our focus shifts to whether Ross reasonably could expect that after the bag and pouch were seized by the police, these containers nevertheless would remain unopened. In differentiating fourth amendment treatment of containers, parcels, and packages from that of personal luggage, the *Sanders* Court stated that although the need for a warrant to search nonluggage does not depend "upon whether they are seized from an automobile,"[2] not all container types "deserve the full protection of the Fourth Amendment." *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979). The Court left us without detailed

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[2] Consequently, the police may not capitalize on a container's momentary presence in a vehicle as a pretext for searching the container without a warrant. In *Chadwick*, the Court disallowed the opening of a footlocker that the police had not attempted to search, although they had probable cause to do so, until the defendant stowed the footlocker in the trunk of a car. In *Sanders*, the police had probable cause to search Sanders' suitcase before it was placed in the taxicab trunk, *see* Arkansas v. Sanders, 442 U.S. 753, 766 (1979) (Burger, C.J., concurring in the judgment), but the police chose to wait. Nevertheless, although storing a container in a car does not suddenly strip the owner of his legitimate expectation of privacy in the container's contents, the presence of a container in an automobile may allow the police to discover and take possession of the container without a search warrant.

guidance concerning just what nonluggage containers require a warrant before being searched. We must therefore determine whether a paper bag or a leather pouch may be searched immediately after their proper seizure, or if, like lugagge, they may only be impounded until the police officers can obtain a warrant to search them. *See id. at* 772 (Blackmun, J., dissenting).

III

I believe that absent unusual circumstances not present here, the fourth amendment does not forbid the police from opening a paper bag once it is properly in their hands. After analyzing the privacy expectation in a paper bag lawfully seized by police, I conclude that the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control.

In traveling to this conclusion, I am fortunate that a portion of my path has been illuminated by the federal and the state courts that have already dealt with related situations. In general, invalidation of warrantless searches has been confined to the types of containers normally associated with personal luggage: a suitcase, a briefcase, a purse, a duffle bag, a backpack, a gym bag, a vinyl satchel, or a guitar case.[3] On the other hand, courts generally have found

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[3] (1) *Suitcase:* United States v. Montano, 613 F.2d 147 (6th Cir. 1980) (per curiam); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (Ariz. Ct. App. 1979); Haughland v. State, 374 So. 2d 1026 (Fla. Dist. Ct. App. 1979); Buday v. State, 150 Ga. App. 686, 258 S.E.2d 318 (1979); State v. Gauldin, 44 N.C. App. 19, 259 S.E.2d 779 (1979); West Virginia v. Tomey, 259 S.E.2d 16 (W. Va. 1979). *Cf.* United States v. Kralik, 611 F.2d 343 (10th Cir. 1979) (warrant to search

warrantless searches permissible when confronted with containers dissimilar to luggage: an integral part of an automobile, an open knapsack, a taped

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car), *cert. denied*, 445 U.S. 953 (1980); State v. DeRusha, 74 Ill. App. 3d 641, 393 N.E.2d 619 (1979) (search permitted due to exigent circumstances); People v. Plantefaber, 91 Mich. App. 764, 283 N.W.2d 846 (1979) (exigent circumstances).

(2) *Briefcase:* United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979) (dictum); *In re* B.K.C., 413 A.2d 894 (D.C. 1980); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979); Araj v. State, 592 S.W.2d 603 (Tex. Crim. App. 1979). *Cf.* United States v. White, 607 F.2d 203 (7th Cir. 1979) (exigent circumstances); United States v. Calendrella, 605 F.2d 236 (6th Cir.) (*Chadwick* not applied retroactively), *cert. denied*, 444 U.S. 991 (1979); United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) (search incident to arrest), *cert. denied*, 100 S.Ct. 2966 (1980); State v. Daniel, 589 P.2d 408 (Alas. 1979) (inventory search, decision based on Alaska constitution).

(3) *Portfolio:* United States v. Miller, 608 F.2d 1089 (5th Cir. 1979), *cert. denied*, 100 S.Ct. 3020 (1980).

(4) *Purse:* Ulesky v. State, 379 So.2d 121 (Fla. Dist. Ct. App. 1979).

(5) *Wallet: Cf.* State v. Hlady, 43 Or. App. 921, 607 P.2d 733 (1979) (search permitted as being incident to arrest).

(6) *Duffle bag:* United States v. Johnson, 588 F.2d 147 (5th Cir. 1979).

(7) *Backpack:* United States v. Meier, 602 F.2d 253 (10th Cir. 1979).

(8) *Gym bag:* State v. Marcum, 24 Wash. App. 441, 601 P.2d 975 (1979). *Cf.* Hassapelis, 404 A.2d 232 (Me. 1979) (harmless error).

(9) *Tote bag:* United States v. Benson, 631 F.2d 1336 (8th Cir. 1980); People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 444 U.S. 887 (1979).

(10) *Travel bag:* People v. Little, 598 P.2d 140 (Colo. 1979) (en banc).

[Footnote continued on page 36a]

electric razor case, a toolbox, a closed but unsealed department store box, or a closed but unsealed envelope.[4]

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[3] [Continued]

(11) *Guitar case:* United States v. Bella, 605 F.2d 160 (5th Cir. 1979) (per curiam).

(12) *Camera case:* State v. DeLong, 43 Or. App. 183, 602 P.2d 665 (1979) (decided under combination of *Sanders* and Oregon precedent).

But see State v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979) (closed metal box), *cert. denied*, 445 U.S. 946 (1980).

Although in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), *adhered to on rehearing*, 615 F.2d 10 (2d Cir. 1980), the court held that a warrant was necessary to search three large cardboard boxes, the court predicated its conclusion on its findings that the use of plastic tape to seal the boxes and the secreting of the boxes behind covered windows "manifested an expectation that the contents would remain free from public examination." *Id.* at 1045. *Accord*, United States v. Rivera, 486 F. Supp. 1025 (N.D. Tex. 1980) (sealed polyethylene bags); State v. White, 615 P.2d 1004 (N.M. App. 1980) (closed, partially sealed boxes and bags); People v. Spencer, 74 A.D.2d 77, 426 N.Y.S.2d 605 (App. Div. 1980) (sealed cardboard carton). *See* United States v. Mannino, 487 F. Supp. 508 (S.D.N.Y.) (no reasonable expectation of privacy in unsealed cardboard boxes), *aff'd*, 635 F.2d 110 (2d Cir. 1980). *But see* People v. Robbins, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (no reasonable expectation of privacy in taped, plastic-wrapped package), *cert. granted*, 49 U.S.L.W. 3515 (U.S. Jan. 19, 1981) (No. 80-148).

[4] (1) *Integral part of the automobile:* United States v. Dall, 608 F.2d 910 (1st Cir. 1979) (camper cap), *cert. denied*, 445 U.S. 918 (1980); *cf.* United States v. Ramapuram, No. 79-5051 (4th Cir. Oct. 9, 1980) (junked car).

(2) *Unlatched knapsack:* State v. Schrier, 283 N.W.2d 338 (Iowa 1979).

(3) *Closed satchel:* United States v. Milhollan, 599 F.2d 518 (3d Cir.), *cert. denied*, 444 U.S. 909 (1979) (three Jus-

Several courts have looked at paper bags in particular, and have concluded a search is permissible after their seizure. In *United States* v. *Mackey*, 626

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tices would have granted the writ and reversed under *Sanders*).

(4) *Taped electric razor case:* Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. Ct. App. 1979).

(5) *Closed but unlocked toolbox:* Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977).

(6) *Closed but unsealed department store box:* United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (inventory search permitted because boxes cannot be closed securely).

(7) *Cigar box:* In the Matter of Isaiah Horne, No. 803DC671 (N.C. App. Dec. 16, 1980).

(8) *Envelopes:* United States v. Sanders, 631 F.2d 1309 (8th Cir. 1980); United States v. Duckett, 582 F.2d 1309 (5th Cir. 1978).

(9) *Burlap bag:* State v. Casillas, No. 80-K-1564 (La. Jan. 26, 1981); Burkett v. State, No. CR 80-121 (Ark. Nov. 17, 1980) (dictum).

(10) *Plastic bags:* United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (plastic and paper bags); United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 & 77-3220 (9th Cir. Feb. 10, 1978) (memorandum) (plastic and burlap bags), *cert. denied*, 439 U.S. 925 (1978), *quoted in* United States v. Stevie, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); State v. Duers, No. 8010SC405 (N.C. App. Oct. 21, 1980); State v. Januszewski, 42 C.L.J. 8 (Conn. Aug. 19, 1980) (garbage bag in automobile); Flynn v. State, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979). *But see* Liichow v. State, 419 A.2d 1041 (Md. 1980) (manner and circumstances of defendant's possession of personal belongings in plastic bag demonstrated a reasonable expectation of privacy).

(11) *Paper bags:* United States v. Sutton, 636 F.2d 96 (5th Cir. 1981); United States v. Brown, 635 F.2d 1207 (6th Cir. 1980); United States v. Honigman, 633 F.2d 1336 (9th Cir. 1980) (paper bag inside grocery bag); United States v. Mackey, 626 F.2d 684 (9th Cir. 1980); United States

F.2d 684 (9th Cir. 1980), police discovered a paper bag beneath the front seat of an automobile on the passenger's side. Finding no reason to distinguish between the clearly justified seizure of the bag and the search of its contents, the court held that the defendant did not possess a sufficient privacy interest in the paper bag to justify imposing the warrant requirement of *Chadwick* and *Sanders*. In *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980), police discovered two plastic bags inside three brown bags which were further inside two other plastic bags, all within the *locked trunk of an automobile*. The court held that the facts of record failed to establish that the defendant possessed a reasonable expectation of privacy in the bags found within the automobile trunk. The Second Circuit held that a warrantless search of a folded-over brown paper bag inside a folded-shut plastic bag located on the front seat of an automobile would not violate the fourth amendment. *United States* v. *Mannino*, No. 80-1206 (2d Cir. Nov. 18, 1980). Furthermore, the Seventh Circuit held that a defendant had no reasonable expectation of privacy in a brown paper bag located within a locked automobile trunk. *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980). In *United*

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v. Jimenez, 626 F.2d 39 (7th Cir. 1980); United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980); United States v. Vento, 533 F.2d 838 (3d Cir. 1976); United States v. Andrews, No. 79 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979) (approved without discussion although *Sanders* cited elsewhere in opinion); People v. Fick, 107 Cal. App.3d 892, 166 Cal. Rptr. 106 (1980); State v. Cavegn, 294 N.W.2d 717 (Minn. 1980); Clark v. State, 574 P.2d 1261 (Alas. 1978); Webb v. State, 373 So.2d 400 (Fla. Dist. Ct. App. 1979) (dictum). *See* United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980) (touch of paper bag located in automobile trunk revealed presence of handgun).

States v. *Brown*, 635 F.2d 1207 (6th Cir. 1980), the Sixth Circuit upheld the warrantless search of a closed paper bag found in an automobile trunk. In yet a sixth ruling by a federal appellate court on this point, the Fifth Circuit upheld the warrantless search of a paper sack located on the front floorboard of an automobile. *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981).

In *United States* v. *Andrews*, No. 79 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979), an undercover agent had seen a brown paper bag and a vial of clear liquid, taken from the bag, which had been identified as the "juice." Later, after surveillance, police arrested the driver of a car. While searching the car's trunk, the arresting officer observed a brown paper bag. Searching the paper bag, the officer found the vial previously shown to the undercover agent. Although citing *Arkansas* v. *Sanders*, the court denied a motion to suppress without discussing the warrantless search of the bag. In *Clark* v. *State*, 574 P.2d 1261 (Alas. 1978), a search of defendant's rental car uncovered a paper bag in the glove compartment. Still without a warrant, the police officer opened the bag and discovered it contained narcotics. Affirming Clark's conviction, the Alaska Supreme Court compared this case with *Chadwick* and concluded that the expectation of privacy was much lower in a paper bag's contents than in a footlocker's. Reaching the same conclusion, the court in *Webb* v. *State*, 373 So.2d 400 (Fla. Dist. Ct. App. 1979), noted that there are

> arguable differences between the reasonable expectation of privacy one might attach to a paper bag as opposed to a briefcase or luggage of some type. Whereas "luggage is a common repository

> for one's personal effects, and therefore is inevitably associated with the expectation of privacy," *Arkansas* v. *Sanders*, *supra*, the same does not hold true to paper bags.

Id. at 403. Courts have also found the contents of opaque plastic bags, containers comparable to paper bags, to be entitled to a lesser expectation of privacy than personal luggage. *See, e.g., United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980); *United States* v. *Ficklin*, Nos. 77-2923 & 77-3320 (9th Cir. Feb. 10, 1978) (memorandum), *cert. denied*, 439 U.S. 825 (1978), *quoted in United States* v. *Stevie*, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 443 U.S. 911 (1979); *State* v. *Duers*, No. 8010SC405 (N.C. App. Oct. 21, 1980); *Flynn* v. *State*, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979) (contrasting *Sanders*).

Recitation of precedent does not by itself determine whether Ross continued to have a reasonable expectation of privacy after his paper bag was lawfully seized by police. I must also rely on my own analysis of when a legitimate expectation of privacy attaches to a given container, so that absent exigent circumstances, a search requires a warrant. As the Supreme Court declared in *Rakas* v. *Illinois*, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases." 439 U.S. at 143 n.12. Instead, "[l]egitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id. See Smith* v. *Maryland*, 442 U.S. 735 (1979)

(society not prepared to recognize expectation of privacy in identity of telephone numbers called from another telephone). I therefore must decide what "sense of security" should exist in society, and I must do so at least in part by looking at "the customs and values of the past and present . . . ." *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), *quoted in* 1 W. LAFAVE, SEARCH AND SEIZURE § 2.1, at 231 (1978). Other important considerations include the precautions taken to preserve privacy, the manner in which the paper bag was used, and the property rights in the bag at the time of the search. *See* pages 4-5 *supra*. *See also* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. REV. 968, 983-84 (1968) ("The degree of privacy offered by structural characteristics, such as partitions or walls, is an important determinant of an area's character.").

If a paper bag were a form of luggage, my task would be a simple one: *Sanders* requires a warrant before searching any piece of luggage. Paper bags differ from personal luggage in two material respects, however. First, paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its

owner's hands. *See United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980). *Cf. United States* v. *Neumann*, 585 F.2d 355 (8th Cir. 1978) (cardboard boxes not secure; inventory search justified).

Second, paper bags are not *inevitably* associated with the expectation of privacy. *See Arkansas* v. *Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, I do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with day-to-day living. Luggage typically functions as a portable closet and chest of drawers; it follows that a person could justifiably maintain a substantially higher expectation of privacy in his personal luggage than in a paper bag.[5]

We therefore must decide whether, under the circumstances of this case, Ross had a reasonable expectation of privacy in the paper bag that the police discovered during the lawful search of the trunk of his car. The officers had reason to believe that the trunk was the warehouse for Ross's narcotics sales.

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[5] I would not create a rule that only luggage is protected by the fourth amendment. Because society always associates luggage with privacy, the fourth amendment must always protect it. This is not an intrinsic characteristic of the luggage but a legal application of society's manifested expectations—an extrinsic quality, so to speak. Because a paper bag is not a piece of luggage, however, I must undertake the more general inquiry of whether under the facts before us this particular container suggests an expectation of privacy. After examining those facts, I have concluded that Ross's paper bag did not connote such an expectation of privacy. Therefore, there was no privacy interest for the fourth amendment to protect.

Thus it was serving as more than simply a luggage compartment. When the police in searching the trunk came upon a paper bag, there was no indication that it was being used to carry intimate, private items. *See United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *adhered to on rehearing*, 615 F.2d 10 (2d Cir. 1980). *See generally United States ex rel. Cunningham* v. *Follette*, 397 F.2d 143, 145 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969); *Walker* v. *United States*, 327 F.2d 597, 600 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964); *Liichow* v. *State*, 419 A.2d 1041 (Md. 1980).[6] No one disputes that the police had the right to seize the bag to prevent the destruction of its contents, that is, the destruction of possible evidence. *See Arkansas* v. *Sanders*,

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[6] There was no evidence that Ross employed the paper bag as a substitute for luggage, nor do the facts and circumstances manifest any special expectation of privacy. If, for example, the police had found the paper bag amidst suitcases or other luggage, there would have been a stronger indication that the bag was pressed into service as a repository of personal effects. Similarly, if Ross had sealed the paper bag shut, manifesting a special expectation of privacy, the intrusion of a search would have been more than negligible and a search warrant might well have been required. In any situation approaching a borderline case, the police would best be cautious, and obtain a proper search warrant before proceeding.

I read the Supreme Court's decisions interpreting the fourth amendment to state that objective evidence of an expectation of privacy is one factor to be considered in determing whether an asserted privacy interest should be protected. This note attempts to give law enforcement officials some guidance as to the treatment of certain objective evidence with which they are likely to be confronted. The majority opinion appears more interested in mocking the problems resulting from this necessary "line-drawing process," Arkansas v. Sanders, 442 U.S. at 757, than in offering any instruction or guidance.

442 U.S. at 762; *United States* v. *Chadwick*, 433 U.S. 1, 13 (1978). Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure, *see* page 13 *supra*, and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

In the final analysis, my determination of what "sense of security" should exist in society must be based upon general experience and judgment. The facts in this case lead me to conclude that Ross could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession, which is all that enables one to protect a paper bag's contents from public exposure. If, as the *Sanders* decision suggests, there are containers that the police, *after a proper seizure*,[7] may open without a search warrant, Ross's bag must be among the best examples. Thus I agree with Professor LaFave that compared to the warrantless search of luggage, "when the [searched] effects are such things as coats and paper bags, the possessory interest and privacy interest are much less distinct, and it is thus far easier to conclude that the [privacy] interest is not protected by the Warrant Clause whenever exigent circumstances allow a warrantless intrusion upon the [possessory] interest." 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978). *Accord*,

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[7] The majority opinion's irrelevant reference to those who carry their belongings in shopping bags, majority op. at 22 n.30, misapprehends this basic analytical point. Only after a valid *seizure* of the container, pursuant to a warrant or within a well-delineated exception to the warrant requirement, must the legality of a search be addressed.

id. § 5.5 (supp. 1980) (analysis unaffected by *Sanders*).

IV

With respect to Ross's red leather pouch, *Sanders* controls directly. *See* pages 4, 12-13 *supra*. As a type of personal luggage, the pouch, in the words of *Sanders* itself, is a "common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979). Absent a valid warrant or one of the few recognized exceptions, any evidence secured from the leather pouch should be excluded when determining Ross's criminal culpability.

The Government attempts to bring the warrantless search of the leather pouch within the exception for searches incident to a lawful arrest. The attempt fails. Ross does not challenge a police search of his person or of any object associated with his person at the time of his arrest. *See United States* v. *Robinson*, 414 U.S. 218 (1973). When Detective Cassidy seized the pouch and later opened it at police headquarters, it was far from Ross's reach and in the exclusive control of the police. There was no danger Ross might gain access to the pouch and retrieve a weapon or destroy evidence. The police officers had no reason to believe that the pouch contained explosives or any other item that might prove hazardous to themselves or to the public. Ross's arrest cannot excuse a search made a substantial time later and a substantial distance away. *Preston* v. *United States*, 376 U.S. 364, 367 (1964). *See generally United States* v. *Chadwick*, 433 U.S. 1, 15 (1977); *Chimel* v. *California*, 395 U.S. 752, 763-64 (1969).

I agree with the majority that none of the "specifically established and well-delineated exceptions," *Katz* v. *United States*, 384 U.S. 347, 357 (1967), to the warrant requirement applied and that the police failed to follow 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment . . . .'" *Osborn* v. *United States*, 385 U.S. 323, 330 (1966) (quoting *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272 (1960) (opinion of Brennan, J.) (equally divided Court)). The currency found in the red leather pouch should have been suppressed as evidence.[8]

V

Although it is certainly noteworthy that every court confronted with the warrantless search of a paper bag, save for this court today, has upheld the search, *see* pages 9-11 and note 4 *supra*, my analysis of searches based on the container involved should not be construed as offering any *per se* rules. Rather, as this court recently stated, each encounter between law enforcement officers and citizens "is unique, involving the weighing and measuring of contrary indicators." *United States* v. *White*, No. 80-1087, slip op. at 11 (D.C. Cir. Feb. 6, 1981). We must continue to examine the totality of the circumstances in each case. As I interpret current Supreme Court precedent, our duty is to search for objective indicia signalling an expectation of privacy that society is

[8] The Government's counsel conceded at oral argument that the $3,200 in currency found in the pouch was essential to the Government's charge of narcotics possession with intent to distribute, the only crime Ross was convicted of having committed. We are thus unable to excuse introduction of the evidence as harmless error. *See, e.g.*, United States v. James, 473 F.2d 115 (D.C. Cir. 1972).

prepared to accept as reasonable. *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980).

Because Ross's conviction rested in part on evidence that the police obtained through an unlawful search, I would reverse the conviction and remand the case for further proceedings not inconsistent with this opinion.

MACKINNON, *Circuit Judge* (Dissenting). I concur with Judge Tamm's opinion to the extent that it holds the examination of the inside of the paper bag was legal. I also concur in Judge Wilkey's opinion to the extent that it holds that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) should *not* be applied retroactively.

I have examined the leather pouch. It is a small money pouch, 7" x 8" square, 2" wide at the bottom, made of soft, red leather with a zipper along the top. I would not place the paper bag or the small pouch in the category of "personal luggage". *Cf.*, 442 U.S. at 765. In my opinion the luggage cases are not applicable. In fact, with respect to the paper bag, a prominent strip cartoonist, Reggie Smythe, had his character, Andy Capp, make a joke of such claim—Andy Capp: "Where's your mother off to?" Flo: "She's stayin' with Auntie Ada for a few days." Andy: "There she goes now, down to the bus station with 'er matchin' luggage." Flo: "Matchin' luggage?" Andy: "Yeah, two carrier bags from the supermarket." [1] The factual situation here is a far cry from the locked footlocker in *United States* v. *Chadwick*, 433 U.S. 1 (1977).

The seizure of the bag and pouch was supported by probable cause and was reasonably related to the justification for the stop which was very strong probable cause. *Cf.*, *United States* v. *Cortez*, 49 U.S. L.W. 4099 (1980); *Terry* v. *Ohio*, 592 U.S. 1 (1968).

Despite what some decisions state, I have great difficulty in agreeing that subsequently looking into the bag and the pouch from the top should be determined to be "unreasonable"—which *is* the constitu-

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[1] *Washington Post*, June 21, 1980.

tional standard. Amend. IV, U.S. Const. Having *properly* seized the paper bag and the small pouch the police would have acted unreasonably in my opinion if they had *not* merely looked inside.

ROBB, *Circuit Judge, dissenting*: I concur in Judge Tamm's dissent with regard to the paper bag. As for the leather pouch I concur only because I think the result Judge Tamm reaches is compelled by recent decisions of the Supreme Court. With great respect however I must add that to me this result does not make sense. It follows from a rule which creates search-resistant cells or compartments in an area otherwise lawfully subject to search. In my opinion the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room. It is reasonable to extend a lawful search to the wallet and envelope, and to drawers and containers in a room, and I think it equally reasonable to extend a lawful automobile search to containers in the automobile.

Again with respect I find the "expectation of privacy" test impractical. It conditions an officer's right to search upon the subjective feeling of the man challenging the search—or at least upon such feeling as a judge thinks he might reasonably entertain. This amorphous standard causes and will continue to cause doubt and confusion among law-enforcement officers and courts.

WILKEY, *Circuit Judge*, dissenting: In her careful and well-reasoned opinion for the majority, Judge Ginsburg convincingly analyzes the current state of the Supreme Court precedent controlling our decision today. I concur with the majority in its conclusion that the Court's ruling in *Arkansas* v. *Sanders* [1] com-

[1] 442 U.S. 753 (1979).

pels us, a lower court, to hold that a warrant is now required before a police officer may open an opaque container whose shape does not disclose its probable contents, even if the container has been found during a lawful warrantless search of an automobile.

But no matter how correct this holding seems to be, pending further clarification by the Supreme Court, we should not be making this decision today.[2] This case should have been decided without a major constitutional pronouncement from this court. To prevent unnecessary constitutional decisionmaking, the Supreme Court has directed the lower courts to decide potentially dispositive issues concerning the retroactive application of the exclusionary remedy before passing on to substantive questions of constitutional law.[3] But the majority today dismisses—in my view incorrectly—the government's position that the benefits of the *Sanders* rule are not retroactively available to Ross.[4]

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[2] Further enlightenment may be swift in coming. Since we heard oral argument in this case, the Supreme Court has granted *certiorari* in two search and seizure cases involving containers. *People* v. *Robbins*, 162 Cal. Rptr. 780, 103 Cal. App. 3d 34 (Ct. App. 1980), *cert. granted*, 49 U.S.L.W. 3515 (19 Jan. 1981) (No. 80-148); *People* v. *Belton*, 50 N.Y.2d 447, 429 N.Y.S.2d 574, 407 N.E.2d 420 (1980), *cert. granted*, 40 U.S.L.W. 3515 (19 Jan. 1981) (No. 80-328). The fact that Supreme Court action in these two cases is now pending underscores the extent to which our unnecessary pronouncements today are ill-advised.

[3] "[T]he district courts and courts of appeals should follow our practice, when issues of both retroactivity and application of constitutional doctrine are raised, of deciding the retroactivity issue first." *Bowen* v. *United States*, 422 U.S. 916, 920 (1975).

[4] Majority opinion (Maj. op.) at 6-9.

The majority has stumbled over the retroactivity hurdle. Under the standard enunciated by the Supreme Court in *United States* v. *Peltier*[5] and binding on us, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."[6] It is no secret that at the time Detective Cassidy opened Ross's bag and pouch the nation's leading lower courts and commentators were admitting puzzlement regarding how the Supreme Court would ultimately resolve the issue finally addressed by it in *Sanders*.[7] So we would have to impute to Detective Cassidy nearly supernatural powers to see the future before we could charge him with knowledge that his conduct was unconstitutional. The windfall benefit of the exclusionary remedy thus should not be extended to Ross and the evidence uncovered by Cassidy should not be the subject of *ex post facto* suppression.

In Part I of the opinion that follows I show why the majority plainly errs in gratuitously conferring on Ross the advantages of *Sanders*. Then, having been forced to address the merits by the majority's determination that *Sanders* applies retroactively, I set forth in Part II why I believe a judge sitting on a lower court must agree with the majority's conclusion that *Sanders* applies to paper bags. Finally, in

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[5] 422 U.S. 531 (1975).

[6] *Id.* at 542.

[7] For example, Prof. LaFave wrote at about the time of the events with which we are concerned here: "It is impossible to predict how the court would decide [a case like *Sanders*]." 2 W. LAFAVE, SEARCH AND SEIZURE 7.2, at 538-39 (1978). See the discussion in Part I below.

Part III I take the opportunity this case presents to underscore once again the devastating impact the exclusionary remedy has had on the administration of the criminal justice system. The elimination of this ill-conceived anachronism is now long overdue.

I. The Retroactive Reach of Sanders

While for the reasons set out in Part II of this opinion I agree with the majority that *Sanders* established that a suspect has a constitutional right to have the police obtain a warrant before they open a container found during a search of a car, I do not agree that the appellant before us is entitled to the benefits of the exclusionary *remedy* for violations of the *Sanders* rule that occurred *before Sanders* was decided. The exclusionary remedy is not a personal right to which Ross can lay claim;[8] it is merely a

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[8] *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) ("Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.') (citation omitted); *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted) ("the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

While the Court has often reiterated that the exclusionary remedy is not a right to which a defendant is entitled, it has also held that the exclusionary remedy is not available to a defendant whose own Fourth Amendment rights have not been violated. *See, e.g., United States* v. *Salvucci*, 48 U.S.L.W. 4881, 4881 (25 June 1980) ("defendants charged with crimes

judicial attempt to remove whatever incentive there might otherwise be to police misconduct.[9] Because *Sanders* had not yet been decided on the evening when Detective Cassidy opened Ross's brown paper bag and red leather pouch,[10] Cassidy could not possibly have "had knowledge, or . . . properly be[en] charged with knowledge" [11] that opening containers found in a car

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of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated"); *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978) ("it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections"); *Brown* v. *United States*, 411 U.S. 223, 230 (1973); *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Moreover, courts will not exclude unconstitutionally seized evidence without an objection by the defendant or over his assent. Even when a search is "flagrantly illegal," *United States* v. *Payner*, 48 U.S.L.W. 4829, 4830 (23 June 1980), and "possibly criminal," *id.* at 4831, the Court has ruled the evidence obtained cannot be excluded if the defendant lacks standing. *Id.*

[9] *Stone* v. *Powell*, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights."); *Elkins* v. *United States*, 364 U.S. 206, 217 (1960).

[10] The chronology of events is important to what follows: (1) on 21 June 1977 the Supreme Court decided the case of *United States* v. *Chadwick*, 433 U.S. 1 (1977); (2) on 27 November 1978 the appellant, Albert Ross, was arrested and his brown paper bag and red leather pouch searched, Brief for Appellee at 2; (3) on 9 February 1979 the district court held a pretrial hearing on Ross's motion to suppress the evidence obtained from the search of his possessions, *id.* at 1; (4) on 21 March 1979, after a three-day trial, Ross was convicted, *id.* at 1-2; (5) on 20 June 1979 the Supreme Court decided *Arkansas* v. *Sanders*, 422 U.S. 753 (1979).

[11] *United States* v. *Peltier*, 422 U.S. 531, 542 (1975).

without a warrant would later be held to violate the Constitution. A police official cannot be deterred from doing something he could not have known was unlawful. Under the controlling Supreme Court precedent,[12] I accordingly would hold that the evidence Cassidy obtained was properly admitted at Ross's trial.

A. *The Significance of Retroactivity*

In *Sanders* the Supreme Court expanded the scope of the right to a warrant under the Fourth Amendment to cover containers found during a lawful search of the integral parts of an automobile. In the case before us, a majority of this court has felt it necessary to reach the question whether Ross's brown paper bag is a container of a type subject to the *Sanders* mandate, and to hold that it is.[13] But before Ross himself can benefit from *Sanders* two other questions must be answered in his favor: it must be decided, first, that the right announced in *Sanders* applies retroactively to pre-*Sanders* searches, and if so, that the exclusionary *remedy* for violations of that right are also available retroactively.

Admittedly, the answers we give to these questions in the long run will be of lesser significance than the holding to which the court today directs most of its energy—that *Sanders* applies to paper bags.[14] It hardly needs to be said that the conclusion that *Sanders* applies retroactively will be dispositive of only the relatively few cases arising from events occurring during a limited stretch of time.

Nevertheless, were we to find that the exclusionary

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[12] *United States* v. *Peltier*, 422 U.S. 531 (1975).

[13] Maj. op. at 24.

[14] *Id.*

remedy for violations of the *Sanders* rule is *not* available retroactively, the outcome of Ross's case could be determined without reaching the broader constitutional question the majority today addresses, and on which I therefore have felt obliged to write. To prevent just this sort of unnecessary constitutional decisionmaking, the Supreme Court has explicitly directed us to follow the practice of deciding retroactivity issues first whenever possible.[15] Were this court to do otherwise, it would not only disobey the mandate of the Supreme Court, but demonstrate that it misunderstands the proper constitutional role of the federal courts.[16]

The majority, of course, did address the retroactivity question first,[17] but, its determination that *Sanders* applies retroactively is plainly in error. Unfortunately, this error is compounded in that it provides the excuse necessary to permit the majority to reach a constitutional issue we could have left for another day.

B. *The Controlling Precedent*: United States *v.* Peltier

As the majority opinion admits, the Supreme Court held in *United States* v. *Peltier*[18] that "decisions expanding the scope of the exclusionary rule should have prospective effect only."[19] The *Peltier* opinion is the

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[15] *See* note 3 *supra.*

[16] *See, e.g., Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[17] Maj. op. at 6-9.

[18] 422 U.S. 531 (1975). For commentary on *Peltier* see 19 How. L.J. 159 (1976); 13 Am. Crim. L. Rev. 317 (1975).

[19] Maj. op. at 6.

key to determining whether the exclusionary remedy should be applied retroactively to searches in violation of *Sanders*. It is thus worth recalling in some detail what the *Peltier* court decided.

Peltier announced useful guidelines for the retroactive application of the exclusionary rule remedy, but in doing so it did not create new doctrine. It merely codified what had previously been decided piecemeal. For prior to *Peltier*, as the Court noted:

> [I]n every case in which the Court ha[d] addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court . . . concluded that any such new constitutional principle would be accorded only prospective application.[20]

In *Peltier* the Court did little more than set forth in a single opinion the basis for this unbroken string of decisions.[21]

To show why the Court had repeatedly come to the same conclusion, Justice Rehnquist first recounted the two principal functional bases for the exclusionary remedy: (1) the "imperative of judicial integrity" [22] demanding that courts not become "ac-

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[20] 422 U.S. at 535 (citations omitted).

[21] The Court, *id.*, cited *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Desist* v. *United States*, 394 U.S. 244 (1969); *Jenkins* v. *Delaware*, 395 U.S. 213 (1969); *Williams* v. *United States*, 401 U.S. 646 (1971); and *Hill* v. *California*, 401 U.S. 797 (1971).

[22] 422 U.S. at 536 (quoting *Elkins* v. *United States*, 364 U.S. 206, 222 (1960)).

complices in the willful disobedience of a Constitution they are sworn to uphold" [23] by permitting the use at trial of evidence unlawfully obtained; and (2) the "deterrent purpose served by the exclusionary rule" [24] in removing an incentive to unlawful police behavior. Because the exclusion of otherwise reliable evidence obstructs the primary factfinding function of a trial, the Court concluded that the retroactive application of the exclusionary remedy should always be based on the outcome of a balancing test weighing the disruption of accurate factfinding against the probable benefits of the exclusion of evidence. In the Court's words: "Whether or not the exclusionary rule should be applied . . . depends on whether considerations of either judicial integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that" [25] evidence of unquestioned "reliability and relevancy" [26] be excluded.

The *Peltier* Court not only set out the interests to be weighed by future courts, but itself undertook a threshold balancing of the competing considerations in order to identify those situations in which the functional purposes of the exclusionary rule are so little served that the balance *always* compels admission of otherwise reliable and relevant evidence. Examining in turn both functional pillars of the exclusionary rule, the Court first observed that "the intro-

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[23] *Id.* (quoting *Elkins* v. *United States*, 364 U.S. 206, 223 (1960)).

[24] *Id.*

[25] *Id.* at 539.

[26] *Id.* (quoting *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965)).

duction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms [does] not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold.'" [27] The Court then noted, with regard to the deterrent aims of the exclusionary remedy, that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force" [28] because it "necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct." [29] The Court therefore concluded that a balancing of interests always requires admission of evidence in retroactivity cases where the officer involved acted in reasonable reliance on prior legal pronouncements from authoritative sources. In short, the *Peltier* rule binding on this court is: "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." [30]

C. *The* Peltier *Standard and Detective Cassidy's Search*

The key question we must decide, then, is whether Detective Cassidy, when he opened Ross's brown paper bag and red leather pouch, could possibly have

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[27] *Id.* at 536 (quoting *Elkins* v. *United States*, 364 U.S. 206, 223 (1960)).

[28] *Id.* at 539 (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974)).

[29] *Id.*

[30] *Id.* at 542.

"had knowledge, or . . . properly be[en] charged with knowledge" that his actions violated the Constitution. I conclude he could not have been so charged. To understand why, it is necessary to put the state of the law on 27 November 1978, when Cassidy searched Ross's trunk, into perspective.

Detective Cassidy opened Ross's trunk fifty-three years after the Supreme Court authorized warrantless searches of automobiles in *Carroll* v. *United States*[31] and seventeen months after the Court decided *United States* v. *Chadwick*.[32] While *Chadwick* merely held that a warrant is required before police can open personal luggage seized under circumstances in which existing exceptions to the warrant requirement, including the *Carroll* exception, cannot be invoked, and thus in no way directly involved the *Carroll* exception,[33] it is nonetheless of some significance here because it evidently set some people, in-

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[31] 267 U.S. 132 (1925).

[32] 433 U.S. 1 (1977).

[33] The government initially sought at the original pretrial suppression hearing to justify the search in *Chadwick* on the basis of the *Carroll* exception. *United States* v. *Chadwick*, 393 F. Supp. 763, 771 (D. Mass. 1975). The district court, however, granted the defendant's motion to suppress. *Id.* at 773. The government then filed a motion asking the district court to reconsider and to vacate its grant of the defendants' motion to suppress, this time arguing that the search was justified as a search incident to an arrest. *Id.* at 773-75 The government abandoned its attempt to bring the search within the ambit of *Carroll*, and never again pursued the *Carroll* theory in the ensuing litigation. The auto search exception was not argued by the government at the circuit court level, *United States* v. *Chadwick*, 532 F.2d 773, 778-79 (1st Cir. 1976), nor at the Supreme Court level, *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977).

cluding some courts, to speculating that the Supreme Court might be prepared to cut back on the *Carroll* exception by removing from its ambit containers found during a lawful warrantless search of a car. Because *Chadwick* must be the pivotal point of any reasonable argument that Detective Cassidy should somehow have been sufficiently prescient to have predicted *Sanders*,[34] it is necessary closely to consider just what *Chadwick* in fact accomplished.

The facts of *Chadwick* are simple.[35] Unknownst to him, Chadwick was in the company of government agents when he met the train on which two accomplices had travelled from San Diego to Boston with a double-locked footlocker containing contraband. As he and his two partners in crime *began loading* the footlocker into the trunk of his parked car, the agents, with ample probable cause, seized the footlocker and arrested all three. The footlocker, reduced to the agents' exclusive possession and control, was removed to the Federal Building, and, after one-and-one-half hours had passed, searched without a warrant. At a pretrial suppression hearing, Chadwick attacked the warrantless search on the basis that it had violated his rights under the Fourth Amendment.[36]

When this litigation reached the Supreme Court, the government seized on the case as a chance to offer the Court three separate opportunities to expand the government's right to conduct searches without a

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[34] *See* Maj. op. at 6-9, arguing that the opinion for the Court in *Sanders* "br[o]k[e] no new ground" but rather "simply explained and aplied doctrine welded in place since *Chadwick*."

[35] *See United States* v. *Chadwick*, 433 U.S. 1, 3-5 (1977).

[36] *United States* v. *Chadwick*, 393 F. Supp. 763 (D. Mass. 1975).

warrant. First, the government argued the rather extreme position that the "Warrant Clause protects only interests traditionally identified with the home." [37] Had the Court accepted this view, the government's right to search without a warrant would have expanded to encompass almost all situations not closely linked to a dwelling. Second, the government argued that the exception to the warrant requirement for searches incident to an arrest includes the search of "any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime." [38] Had the Court adopted this theory, the exception for searches incident to an arrest would have grown to include even searches "remote in time or place from the arrest." [39] Finally, the government argued by analogy to the *Carroll*, or automobile, exception to the warrant requirement that warrantless searches of other mobile objects do not offend the Fourth Amendment.[40] Had the Court been persuaded to accept this argument, the automobile search exception would have been replaced by a much broader "mobile personalty" exception.

The Court, however, rejected all three government attempts to expand its rights to search without a warrant, leaving seach and seizure law where it stood before. Two points about *Chadwick* critical to our analysis of the state of the law at the time Ross's trunk was searched should be noted: (1)

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[37] *United States* v. *Chadwick*, 433 U.S. 1, 6 (1977).

[38] *Id.* at 14.

[39] *Id.* at 15 (quoting *Preston* v. *United States*, 376 U.S. 364, 367 (1964)).

[40] *Id.* at 11-13.

Chadwick in no way involved the *Carroll* exception to the warrant requirement. The car search exception simply was not in the case. Indeed, the government did not (and sensibly could not) invoke it;[41] and (2) *Chadwick* did not cut back on *any* previously endorsed exception to the warrant requirement; rather, it represented a refusal by the Court to *expand* the government's rights to search without a warrant. In short, when *Chadwick* was decided it would have been quite reasonable to conclude that it had nothing to do with the automobile search exception at all.

Sophisticated observers of the Supreme Court, not unlike astute observers of the Kremlin, however, attempt to draw as much meaning as possible from whatever subtle nuances they think they might be able to detect in Supreme Court opinions. So it did not go unnoticed that Justice Blackmun had drawn a response from another Justice when he wrote in dissent in *Chadwick* that "if the agents had postponed the arrest a few minutes longer until [Chadwick and company] started to drive away, then the car could have been seized, taken to the agents' office, and all its contents—including the footlocker—searched without a warrant."[42] In response, Justice Brennan, writing for himself in a concurrence to the Court's opinion, answered Justice Blackmun by stating that "it is not at all obvious that the agents could legally have searched the footlocker had they seized it after [the suspects] had driven away with it in their car."[43] This comment, taken together with

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[41] *See* note 33 *supra*.

[42] *United States* v. *Chadwick*, 433 U.S. 1, 22-23 (1977) (Blackmun, J., dissenting).

[43] *Id.* at 16-17 (Brennan, J., concurring).

the suggestion that *Chadwick* be read as disclosing that the Court was preparing to adopt the view that personal luggage is entitled to special protection under the Fourth Amendment, set the stage for a flurry of litigation in the lower courts.

On the day *Chadwick* was decided, support for the two sides of this litigation could have been lined up as follows. On record in favor of the longstanding view that containers found in a car come under the *Carroll* exception were not only the two Justices in dissent in *Chadwick* (Justices Blackmun and Rhenquist) but also the explicit holdings of at least four Circuit Courts of Appeals, the Second,[44] the Fifth,[45] the Seventh,[46] and the Ninth.[47] On the other side, favoring the position that containers found in a car are *not* covered by *Carroll*, could be found only a possible reading of *Chadwick* and Justice Brennan's hint in his response to Justice Blackmun.

By the time Detective Cassidy searched Ross's trunk, however, the Eighth Circuit,[48] the United States District Court for Connecticut,[49] and two state

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[44] *United States* v. *Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

[45] *United States* v. *Soriano*, 497 F.2d 147 (5th Cir. 1974) (*en banc*), *aff'd sub nom. United States* v. *Aviles*, 535 F.2d 658 (1976) (mem.), *cert. denied*, 433 U.S. 911 (1977).

[46] *United States* v. *Issod*, 508 F.2d 990, 993 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975).

[47] *United States* v. *Evans*, 481 F.2d 990, 993-95 (9th Cir. 1973).

[48] *United States* v. *Stevie*, 582 F.2d 1175 (8th Cir. 1978) (*en banc*), *cert. denied*, 443 U.S. 911 (1979).

[49] *United States* v. *Vallieres*, 443 F. Supp. 186 (D. Conn. 1977).

courts [50] had endorsed the view ultimately to be vindicated by the *Sanders* decision, while the Ninth Circuit [51] had reiterated its support of the previously unanimous pre-*Chadwick* view of those Circuit Courts of Appeals that explicitly had considered the question. Meanwhile, the best informed commentary had concluded that in view of *Chadwick* it was no longer possible to determine how the Supreme Court would treat the matter. Prof. LaFave, in his well known treatise, published at about the time Detective Cassidy opened Ross's trunk, summarized the situation as follows: "It is impossible to predict how the Court would decide [a case like *Sanders*], for the reasoning in *Chadwick* and the Court's car search cases does not all point in a single direction." [52]

I submit that if the answer to the legal question governing Detective Cassidy's conduct was impossible for Professor LaFave, it was at least equally impossible for Cassidy.

So what can we reasonably expect Detective Cassidy to have made of this confusion in the courts? Even assuming that his duties as a detective permitted him sufficient time to keep up to the minute with the very latest judicial pronouncements, not just from the District of Columbia courts but from all around the country, and even further assuming that in interpreting those decisions he had access to the most sophisticated lawyers in the field of criminal proce-

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[50] *Shingleton* v. *State*, 39 Md. App. 527, 387 A.2d 1134 (1978); *Sanders* v. *State*, 262 Ark. 595, 559 S.W.2d 704 (1977), *aff'd sub nom. Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

[51] *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977).

[52] 2 W. LAFAVE, SEARCH AND SEIZURE § 7.2, at 538-39 (1978).

dure, is it reasonable to conclude that on 27 November 1978 Detective Cassidy "had knowledge, or may properly [have] be[en] charged with knowledge" [53] that this search of Ross's paper bag and pouch was unconstitutional? Surely not, unless every faint hint emanating from the Supreme Court of a possible forthcoming shift in position, provided it gains some judicial support somewhere, is to become the standard against which police conduct is to be measured. If so, the only "law" on which a police officer is entitled to rely is that promulgated by the most extreme courts in the country, pending a definitive statement from the Supreme Court.[54]

To see the absurdity of attributing to Detective Cassidy foreknowledge of the outcome of *Sanders*, we might speculate for a moment what would have happened if Detective Cassidy, when he confronted Ross's paper bag and leather pouch, was accompanied by a visting "judicial squad" composed of Circuit Judges Friendly, Mansfield, and Meskill of the Second Circuit. If we may be permitted to draw conclusions from the outcome of *United States* v. *Ochs*,[55] a Second Circuit case decided after Detective Cassidy's search, had Cassidy been able to turn to this group for ad-

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[53] *United States* v. *Peltier*, 422 U.S. 531, 542 (1975).

[54] Provided, of course, that a district court or circuit court in the jurisdiction in which the police officer finds himself has not ruled on the question. Presumably, a police officer is entitled to rely on the decisions of the federal courts in his jurisdiction, regardless of the rulings of courts elsewhere.

[55] 595 F.2d 1247, 1254-55 (2d Cir. 1979), *cert. denied*, 444 U.S. 955 (949). In *Ochs* Judge Friendly wrote for the court "we . . . rest our decision on the ground that *Chadwick* did not impair *Chambers* . . . ." *Id.* at 1255. The facts in *Ochs*, were, of course, not identical to the facts in the present case.

vice, two of the three judges would likely have told him that he did *not* need a warrant to open the containers he had found. Yet today the majority charges Cassidy with the knowledge that he *did* need a warrant to satisfy the Constitution.

We imagine that the position of the third judge of the three, Circuit Judge Meskill, would have been agnostic, for in *Ochs* he refused to reach the question. In explanation, he set forth the following admirable description of the state of the law at that time:

> Justice Rehnquist observed in *Cady* v. *Dombrowski* that the law governing warrantless searches and seizures, especially those involving vehicles, "is something less than a seamless web." So serious is the confusion that six years after *Cady* it can fairly be said that the law in this area is developing without any predictability or even discernible direction. Warrantless vehicle search cases shed virtually no light on fact situations which, if one were to attempt to apply the usual methods of legal reasoning, would seem to be distinguishable only on the basis of trivialities. Thus the precedents cast shadows rather than light, making the resolution of each succeeding case less rather than more certain.
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> In the two years since the Supreme Court held unreasonable the warrantless search of a footlocker removed by federal agents from the trunk of an automobile, the lower federal courts have been unable to harmonize their approaches to searches of flight bags, suitcases, and other containers removed from automobiles. . . . Clearly, when the precedents in such a crucial area of constitutional law offer so little guidance that it is difficult to choose between opposite results on

> the basis of superior reasoning, our ability to dispense justice is severely hampered.[56]

Nonetheless, today the majority finds that Detective Cassidy should be "charged with knowledge" of the outcome of *Sanders*.[57]

To be sure, the majority has company in its conclusion that *Sanders* should be applied retroactively. Recent Second and Ninth Circuit opinions have come to the same conclusion.[58] Like the majority of this court, the Second Circuit in *Dien*[59] has concluded that *Sanders* made no new law, and thus applies retroactively. In addition, both the Second Circuit in *Dien* and the Ninth Circuit opinion in *MacKay*[60] draw support for the position that *Sanders* applies retroactively from the fact that the warrantless search whose legality was litigated in *Sanders* took place prior to the Supreme Court's decision in *Chadwick*. I will examine these contentions in turn.

1. *The Proper Test for Prospectivity*

With respect, I believe the majority of this court as well as the *Dien* court have confused the test to be applied in retroactivity cases not involving the exclusionary rule with the standard the *Peltier* decision set forth to be applied in exclusionary rule cases.

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[56] *Id.* at 1262-63 (Meskill, J., concurring) (citations omitted).

[57] Maj. op. at 7 n.5.

[58] *United States* v. *Dien*, 615 F.2d 10 (2d Cir. 1980), *aff'g on rehearing* 609 F.2d 1038 (1979); *United States* v. *MacKay*, 606 F.2d 264 (9th Cir. 1979) (*per curiam*).

[59] 615 F.2d at 11.

[60] *Id.*; 606 F.2d at 265 n.2.

In situations *not* involving the retroactive application of the exclusionary remedy, a decision is limited to prospective application only if it meets each of two tests.[61] The first of these two is a threshold test which quickly eliminates those new substantive decisions that should not seriously be considered for limitation to prospective effect. This first test was set out by the Supreme Court in *Chevron Oil Co.* v. *Huson*,[62] in which the Court stated that a case must decide "an issue of first impression whose resolution was not clearly foreshadowed" [63] before the rule of the case can seriously be considered for prospective application only.

Unless the new decision meets the threshold requirements of the *Chevron Oil* test, it is ineligible for full-blown consideration for limitation to prospective application. If it meets the threshold standards, further consideration is then guided by the three factors set forth in the Supreme Court's decision in *Stovall* v. *Denno*:[64] (1) the purpose of the new result; (2) the extent to which law enforcement officials may have relied on the previous law; and (3) the impact of retroactivity on the administration of justice.[65]

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[61] For a succinct and useful summary of the law regarding the retroactive application of constitutional rulings, see 13 AM. CRIM. L. REV. 317 (1975).

[62] 404 U.S. 97 (1971).

[63] *Id.* at 106. An alternative formulation of the threshold test was provided by Justice Stewart in his dissent in *Milton* v. *Wainwright*, 407 U.S. 371, 381-82 n.2 (1972) (Stewart, J., dissenting). According to Justice Stewart, to qualify for consideration for limitation to prospective effect only, a new rule must plainly overrule past precedents or at least disrupt a long accepted and widely relied upon past practice.

[64] 388 U.S. 293 (1967).

[65] *Id.* at 297.

The Court has placed the greatest importance on the first of these factors, the purpose of the new result, stating that it has relied "heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity." [66]

This two-step analysis, with a threshold test which must be passed before a court moves on to full-scale consideration of the desirability of limiting a ruling to retroactive application, however, is now only applied in retroactivity cases *not* involving the exclusionary remedy; *the Supreme Court announced a different approach to be used in exclusionary rule cases in its opinion in* United States *v.* Peltier. In fact, the majority of the Ninth Circuit, considering *Peltier* before appeal to and reversal by the Supreme Court,[67] as well as the Justices who dissented from the Supreme Court decision in *Peltier*,[68] would have decided *Peltier* by applying just this two-step analysis. Sitting *en banc* the Ninth Circuit, using this analysis, divided seven to six over whether *Almeida-Sanchez* v. *United States*,[69] the substantive ruling behind *Peltier*, could pass the threshold test so that limitation to prospective application could be seriously considered. The battle was over whether *Almeida-Sanchez* so clearly made new law as not to have been foreshadowed. The Justices dissenting in

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[66] *Desist the United States*, 394 U.S. 244, 251 (1969).

[67] *United States* v. *Peltier*, 500 F.2d 985 (9th Cir. 1974) (*en banc*), *rev'd*, 422 U.S. 531 (1975).

[68] Justices Brennan, Douglas, Marshall, and Stewart dissented in *Peltier*.

[69] 413 U.S. 266 (1973).

the Supreme Court as well as the seven-judge majority of the Ninth Circuit concluded that *Almeida-Sanchez* merely "correct[ed] an aberration." [70] The six-judge minority in the Ninth Circuit, however, would have found that *Almeida-Sanchez* passed the threshold test.

The majority in the Supreme Court, however, rejected this entire analysis. In its place was substituted the standard I have summarized above which requires that evidence not retroactively be excluded unless the responsible officer either "had knowledge" [71] or could "properly be charged with knowledge" [72] that his actions were unconstitutional at the time of the search.

Thus, the Second Circuit, by focusing on "whether *Arkansas* v. *Sanders* made new law" [73] and the majority of this court, by inquiring whether *Sanders* developed "new law" [74] or "restate[d] . . . doctrine already in place," [75] are incorrectly applying the initial threshold test appropriate to a consideration of retroactivity outside of the exclusionary remedy context. *Peltier*, however, directs us to apply a different standard to exclusionary rule cases, where the test instead is whether the police official responsible

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[70] *United States* v. *Peltier*, 500 F.2d 985, 989 (9th Cir. 1974) (*en banc*), *rev'd*, 422 U.S. 531 (1975).

[71] 422 U.S. at 542.

[72] *Id.*

[73] *United States* v. *Dien*, 615 F.2d 10, 11 (2d Cir. 1980), *aff'g on rehearing*, 609 F.2d 1038 (1979).

[74] Maj. op. at 7 n.5.

[75] *Id.* at 6.

"had knowledge" [76] or could "properly [have] be[en] charged with knowledge" [77] that his actions violated the Constitution. *The appropriate question to ask, then, is not whether lawyers and judges would describe the new decision as a sharp break with past law, but whether a working patrolman can properly be charged with fore-knowledge of the new decision's outcome.* These are two quite different matters.

Perhaps it is open to extended argument whether, as the majority suggests, *Sanders* merely "restate[d] and applie[d]" [78] past Supreme Court decisions, and in particular *United States* v. *Chadwick*.[79] It is not open to question, however, that before *Sanders* was decided the most expert authorities were unable to predict its outcome. It is also undeniable that *Sanders* made new law in the sense that it put an end to the disorder which had broken out in the lower federal courts and the state courts in the wake of *Chadwick*. *Sanders* "clarified" the law by affirming the decision of the Arkansas Supreme Court; on the other hand, had *Sanders* "clarified" the law by reversing the Arkansas Supreme Court, it would have been easy to argue that *that* outcome also represented no sharp break with the past. Indeed, that argument would have been easier to make. The point is that before *Sanders* the law was so confused that neither outcome could represent a sharp break. It is impossible to break sharply from chaos.

But the question *Peltier* instructs us to consider is not whether *Sanders* broke with the past, but whether

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[76] 422 U.S. at 542.

[77] *Id.*

[78] Maj. op. at 6.

[79] 433 U.S. 1 (1977).

Detective Cassidy can be charged with foreknowledge of its outcome. The answer is plain. If the leading legal authorities, both on and off the bench, could not predict *Sander*'s outcome, how can Detective Cassidy be charged with that prediction? He would have needed a crystal ball neither he nor anyone else had.

I thus conclude that both the majority here and the Second Circuit in *Dien* have erred in part because they have applied the wrong standard. Rather than use the test *Peltier* instructs us to apply to retroactivity cases involving the exclusionary remedy, they have used the older, more general, threshold test to be used in other retroactivity cases. They have thus been led unnecessarily and incorrectly to consider whether lawyers and judges would regard *Sanders* as a sharp, avulsive change in the stream of law, rather than to ask whether Detective Cassidy on the beat could be charged with knowledge of *Sander*'s outcome months before the Supreme Court decided the case. Using the wrong test, they have been led to the wrong results.

2. *Did* Sanders *Implicitly Hold* Chadwick *to Apply Retroactively?*

Both the Second Circuit opinion in *Dien* [80] and the Ninth Circuit decision in *MacKay* [81] offer a second basis for applying *Sanders* retroactively which, though it was not adopted by the majority today, should be addressed. Each of the other circuits has noticed that the search complained of in *Sanders*

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[80] *United States* v. *Dien*, 615 F.2d 10 (2d Cir. 1980).

[81] 606 F.2d 264 (9th Cir. 1979) (*per curiam*).

took place before the Supreme Court decision in *Chadwick*.[82] These courts then conclude that the Supreme Court has decided implicitly to apply *Chadwick* retroactively, which then suggests that *Sanders*, a "clarification" of *Chadwick*, should also be applied retroactively.

This reads far too much into the Court's action in *Sanders*. In the past, the Supreme Court has explicitly refused to read previous cases applying *without discussion* the exclusionary remedy retroactively as foreclosing the retroactivity issue.[83] In fact, in the *Peltier* decision itself the Court referred to the fact that after the Court's landmark decision in *Mapp* v. *Ohio*,[84] three important subsequent cases applied *Mapp* retroactively *without discussion* before the Court then decided *Linkletter* v. *Walker*,[85] in which it refused to apply *Mapp* retroactively on collateral review of state convictions. We are thus on notice that it is inappropriate to read too much into a decision which does not so much as mention the retroactivity question.

In addition, the argument would appear to prove too much, for it implies that not only *Sanders* but also *Chadwick* is to be applied retroactively since the search whose legality was tested in *Sanders* occurred before the Court's decision in *Chadwick*. Although anything is perhaps possible until the Supreme Court speaks to the contrary, the nearly unanimous view of

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[82] Lonnie James Sanders was subjected to search on 23 April 1976. *Chadwick* was not decided until 21 June 1977.

[83] *United States* v. *Peltier*, 422 U.S. 531, 535 n.5 (1975).

[84] 367 U.S. 643 (1961).

[85] 381 U.S. 618 (1965).

those circuits addressing the issue has been that *Chadwick* does *not* apply retroactively.[86]

The only circuit to apply *Chadwick* retroactively, the Eighth Circuit, did so in a case ambiguously remanded from the Supreme Court "for further consideration in light of *United States* v. *Chadwick*." [87] As Chief Judge Gibson put it in his separate concurrence in that Eighth Circuit case, "The Supreme Court remanded the present case for our consideration in light of *Chadwick*, thus *Chadwick* applies to this case whether or not it applies to any other." [88] But that conclusion, though understandable, is nonetheless faulty, as the Supreme Court's treatment of *Bowen* v. *United States* [89] proved. *Bowen* involved the retroactive application of *Almeida-Sanchez* v. *United States*,[90] the case whose retroactive application also was at issue in *Peltier*. A petition for *certiorari* was pending in *Bowen* when the Supreme Court decided *Almeida-Sanchez*. The Court vacated the judgment of the Ninth Circuit in *Bowen* and

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[86] *See United States* v. *Calandrella*, 605 F.2d 236, 250-53 (6th Cir.), *cert. denied*, 444 U.S. 991 (1979); *United States* v. *Cornejo*, 598 F.2d 554, 556-57 (9th Cir. 1979) (*per curiam*); *United States* v. *Stewart*, 595 F.2d 500, 504 (9th Cir. 1979) (*per curiam*); *United States* v. *Berry*, 571 F.2d 2 (7th Cir.), *cert. denied*, 439 U.S. 840 (1978); *United States* v. *Reda*, 563 F.2d 510 (2d Cir. 1977) (*per curiam*), *cert. denied*, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F.2d 311 (5th Cir. 1977) (*per curiam*). *Contra United States* v. *Schleis*, 582 F.2d 1166, 1171, 1173-74 (8th Cir. 1978) (*en banc*).

[87] *Schleis* v. *United States*, 433 U.S. 905 (1977).

[88] 582 F.2d at 1175 (Gibson, C.J., concurring).

[89] 422 U.S. 916 (1975).

[90] 413 U.S. 266 (1973).

remanded it for reconsideration "in the light of *Almeida-Sanchez*." [91] The Ninth Circuit reheard the case *en banc* but nevertheless affirmed the conviction at issue, holding that *Almeida-Sanchez* did not apply retroactively.[92] That conclusion was subsequently approved by the Supreme Court when it once again considered the case.[93]

In sum, it seems at best risky—in view of the Court's recent pronouncement in *Peltier* that an expansion of the exclusionary remedy generally is not to be applied retroactively—to read *Sanders*, in which retroactivity was not even mentioned, to hold that *Chadwick* applies retroactively. The risks are compounded when that conclusion is used to infer that *Sanders* itself applies retroactively. For, as we pointed out above,[94] *Chadwick*, whatever it may have hinted, did not alter the state of the law at that time but merely held the line against a government attempt to expand the rights of its agents to search without warrants. *Sanders*, on the other hand, represents a distinct shift in the law, overruling previous decisions of many of the circuits.[95] Thus, even if

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[91] *Bowen* v. *United States*, 413 U.S. 915, 916 (1973).

[92] *United States* v. *Bowen*, 500 F.2d 960 (9th Cir. 1974) (*per curiam*) (*en banc*).

[93] *Bowen* v. *United States*, 422 U.S. 916 (1975).

[94] *See* pp. 9-14 *supra*.

[95] *E.g.*, *United States* v. *Vento*, 533 F.2d 838, 865-67 (3d Cir. 1976) (paper bag found in car); *United States* v. *Tramunti*, 513 F.2d 1087, 1104-05 (2d Cir. 1975) (suitcase on back seat of car), *cert. denied*, 432 U.S. 832 (1975); *United States* v. *Soriano*, 497 F.2d 147 (5th Cir. 1974) (*en banc*) (suitcases in trunk of taxicab); *United States* v. *Evans*, 481 F.2d 990 (9th Cir. 1973) (footlocker in trunk of car). For discussion and collected cases see 2 W. LAFAVE, SEARCH AND SEIZURE § 7.2(e) (1978 & 1980 Supp.).

Chadwick were to be applied retroactively, a very doubtful proposition, *Sanders* should not be.

Thus, neither of the arguments advanced by the majority opinion today and by the *Dien* and *MacKay* courts is persuasive. The Supreme Court has not signaled us to apply either *Chadwick* or *Sanders* retroactively, and, under the appropriate test, we cannot charge Detective Cassidy with foreknowledge of the outcome of *Sanders*, and therefore cannot apply the result of that case to the search he conducted.

The undeniable truth of the matter is that no one could foretell with confidence how *Sanders* would be decided. As for Detective Cassidy's search of Ross's belongings, it is noteworthy that this court, sitting first in a three-judge panel and now *en banc*, has spent six separate opinions deciding, after the fact, with benefit not only of hindsight but also of the briefs and arguments of counsel, that Cassidy should not have looked into Ross's bag without first obtaining a warrant.

Under these circumstances, suppressing the evidence Cassidy uncovered is nothing short of levying an *ex post facto* penalty on utterly blameless police work undertaken in the line of duty. Suppressing the evidence in this case cannot deter the police from doing what they have no way of knowing is wrong. And surely it does little to help deter the likes of Ross from preying on the public. The majority's action today does not deter the constable from blundering by liberating the criminal. It simply liberates the criminal.

II. The Substantive Reach of Sanders

Because a majority of this court has ruled that *Sanders* applies retroactively, and in view of the

position of my dissenting colleagues that even prospectively *Sanders* does not apply to paper bags,[96] or even to pouches,[97] I find it necessary to address the majority's principal holding: that *Sanders* covers opaque containers whose contents are not perceptible from the exterior.

Of course, were it not for the Supreme Court's decision in *Arkansas* v. *Sanders*, the outcome of this case would be obvious; at least since 1925 when the Supreme Court decided *Carroll* v. *United States*,[98] lower courts have assumed that an offier with probable cause but without a warrant may stop and search a conveyance and its contents for contraband.[99] *Sanders*, however, holds otherwise.

In effect, Sanders *abolished the automobile exception to the warrant requirement as applied in narcotics cases.* Traffickers do not spoon contraband powders into glove compartments or shovel them into trunks; narcotics are transported in containers—after *Sanders* in opaque containers. To search successfully for narcotics hidden in a car a policeman must open the containers he comes upon. But in 1979, after more than a half century of experience with the automobile search exception and in the midst of an epidemic of narcotic addiction, the Court suddenly ruled that before an officer can open a container found in a car he must get a warrant.

This result further complicates the job of the conscientious law officer, adding to the bewildering array of legal issues he faces each time he approaches a

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[96] Tamm and Robb, J.J., dissenting *ante*.

[97] Mackinnon, J., dissenting *ante*.

[98] 267 U.S. 132 (1925).

[99] *See* authorities cited note 95 *supra*.

car. The *Sanders* dissent summarizes what an officer must do:

> In approaching the vehicle and its occupants, the officer must divide the world of personal property into three groups. If there is probable cause to arrest the occupants, then under *Chimel* v. *California*, he may search objects within the occupants' immediate control, with or without probable cause. If there is probable cause to search the automobile itself, then under *Carroll* and *Chambers* the entire interior area of the automobile may be searched, with or without a warrant. But under *Chadwick* and [*Sanders*], if any suitcase-like object is found in the car outside the immediate control area of the occupants, it cannot be searched, in the absence of exigent circumstances, without a warrant.[100]

Sanders thus adds yet another layer of complexity to the legal analysis a well-intentioned officer approaching a car must carry out on the spot. Unfortunately, if there is contraband in the car and the officer's snap legal judgment is in error, the responsible criminal in all likelihood will go free: either because the officer too precipitously terminated his investigation before discovering the evidence he needed, or because he continued too far or too fast, thereby forcing a judge later to suppress the evidence obtained.

Moreover, police officers on patrol will not be alone in their confusion. We in the courts will also be presented with new Fourth Amendment puzzles to solve; the present litigation undoubtedly is only the

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[100] 442 U.S. at 771 (Blackmun, J., dissenting) (citations omitted).

beginning of the flood to follow. We will be asked not only to determine whether a container is sufficiently luggage-like to qualify for special treatment under *Sanders*, but also to decide whether a container found somewhere in a car and opened without a warrant conceivably was within grabbing distance of the car's arrested occupant, whether an officer in a given instance could in fact discern the contents of an opaque container from its suspicious size and shape,[101] and so forth.

Perhaps most troubling will be the inevitable stream of consent cases in which the courts will be requierd to determine whether an investigating officer obtained effective consent before opening a container found in a car, and if he did, whether it was lawfully obtained and voluntarily granted. From our experience with consent searches of dwellings we know each such case will present unique facts, making it impossible to enunciate general rules applicable to most situations.[102] In consequence, state and federal courts will be flooded with appeals whose resolution will add little to already-existing law.

The new complications *Sanders* adds to Fourth Amendment analysis and the litigation it has and will continue to spawn would perhaps nonetheless be justified if *Sanders* brought a long-awaited co-

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[101] The opinion of the Court in *Arkansas* v. *Sanders* exempts from the warrant requirement containers whose "contents can be inferred from their outward appearance." 442 U.S. at 764 n.13.

[102] For a recent discussion of the difficulties associated with consent searches see Comment, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIMINOLOGY 163 (1980).

herence and consistency to search and seizure doctrine. But *Sanders* merely reinforces the existing contradictions. How can it be explained on principled grounds why a policeman without a warrant may force open a locked glove box but not lift the lid on an unlocked jewelry box? [103] Certainly recourse to the doctrine of exigent circumstances is of little help, for it fails to explain why the locked glove box—but not the jewelry box—can be opened without a warrant by an officer who already has secured an automobile at the stationhouse.[104] The law of search warrants as applied to automobiles is no more a seamless web [105] after *Sanders* than before.

With respect, I am unable to understand why *Sanders* and its precursors were decided as they were; even those with the deepest admiration for the work of the Supreme Court have rarely put its development of the law regarding the exclusionary rule at the top of the list for clarity and consistent logic. The question here, however, is whether *Sanders* controls the case before this subordinate court. Plainly, *Sanders* could be distinguished either by following the suggestion of Chief Justice Burger and Justice Stevens concurring in *Sanders* itself,[106] or by adopting an approach similar to that set forth

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[103] A jewelry box presumably cannot be opened without a warrant under the *Sanders* rule because it qualifies as personal luggage, while a glove box, an integral part of the automobile to which it is attached, comes within the *Carroll* exception.

[104] *See Chambers* v. *Maroney*, 399 U.S. 42 (1970).

[105] *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973) ("this branch of the law is something less than a seamless web").

[106] 442 U.S. at 766-68 (Burger, C.J., concurring in the judgment). *See* pp. 44-45 *infra*.

by Judge Tamm writing in dissent here. But I am persuaded that the scope of *Sanders* is such that it would be inappropriate to do so. The Supreme Court has spoken; we at this court must follow. As a lower court we are required to adhere to the most recent mandate set down by the Supreme Court to the extent with the most conscientious effort we are able to understand its content. To understand what the Court intended *Sanders* to mean—and to determine how narrowly it should be read—it is useful to begin with a fresh examination of the purposes and limitations of search warrants as applied to containers found in automobiles.

1. *The Purposes Served by a Warrant.* As traditionally applied to the search of a *dwelling* the warrant requirement is said to serve at least three purposes.[107] First, it provides an independent confirmation by a neutral and detached magistrate before, not after, a search occurs, that probable cause exists. As a result, in the event a magistrate does not find probable cause, the warrant requirement reduces the level of official intrusion to zero; the intended subject of the search will in all likelihood never become aware a search was even threatened.

Second, the warrant requirement limits the area to be searched and the objects to be seized to those enumerated in the warrant, restricting the scope of the search to the minimum area necessary to accomplish the purpose for which the warrant was authorized. By providing a written record of the basis for

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[107] *See, e.g., Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *United States* v. *Chadwick*, 433 U.S. 1, 9 (1977); *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967) *Johnson* v. *United States*, 333 U.S. 10, 14 (1948).

the search, a warrant thus helps to limit the range of *post hoc* rationalizations that can later be used to justify a search of broader sweep than was constitutionally authorized at the outset.

Finally, a warrant reassures the subject of a search that the individuals demanding entrance to his home are authorized police agents with a legal purpose, rather than officers on some frolic of their own. Unquestionably, a citizen is likely to resent even a wholly lawful invasion of his home. But many, perhaps, are able to swallow such an intrusion as a necessary price of citizenship.[108] It is an outrage of a different order—and far more frightening—to be the victim of an invasion by officers abusing their ability to act under color of law. The warrant removes this apprehension.

When a *container* is seized from an *automobile* after a lawful warrantless search of a car, however, these advantages largely evaporate.[109] First, in the event a warrant does not issue for the containers seized, the level of intrusion is reduced modestly, if at all. The car's occupants already have been stopped, detained, and deprived of control over the seized container. In all likelihood, they also have been arrested,

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[108] We pay other similar prices, whose direct relation to our own personal safety and welfare is more obvious, *e.g.*, security searches at airports and entrances to public buildings. But all reasonable searches by authorities are directed at preserving the safety and welfare of us all, *e.g.*, searches for guns and narcotics on the street, even the routine demand for displaying a driver's license to keep unqualified drivers off the thoroughfares. The individual inconvenienced is only paying the price for the common (including his own) good.

[109] *Arkansas* v. *Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting) ("the additional protection provide by a search warrant will be minimal").

for in most cases probable cause to search for contraband will also provide probable cause to arrest its possessors. Should they be arrested, the car's occupants will in addition be subject to searches of their persons [110] and of the area within grabbing distance of them.[111] At this point, if a warrant fails to issue, the additional intrusion they have been spared is surely minimal compared with that which has gone before. By contrast, when a warrant does not issue for the search of a dwelling, the householder is spared even knowledge of the proposed search.

A warrant requirement for containers, moreover, does not define the area to be searched and the objects to be seized; the car has already been searched and the containers seized by the time the warrant issues. Just as obviously, the warrant requirement for searches of containers found in a car does not serve the function of reassuring the occupants of the officer's lawful purpose and authority. After they have been stopped, searched, deprived of control over their property, and taken to the police station, the moment for reassuring the car's occupants of the lawful purpose of the police long since will have passed.

A warrant requirement for *containers* thus provides only a small fraction of the protection assured by the warrant requirement for *dwellings*. How little is left is demonstrated by considering what value a warrant would be if the same rules applied to the search of houses as to the search of cars. Were the warrant requirement for houses to parallel that

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[110] *See, e.g., United States* v. *Robinson*, 414 U.S. 218 (1973); *Gustafson* v. *Florida*, 414 U.S. 260 (1973).

[111] *See Chimel* v. *California*, 395 U.S. 752 (1969).

for cars, officers with probable cause would be authorized to enter a house without producing a warrant, to range free throughout the house while examining its contents, to open cupboards, closets and anything else immovable, then to scoop up any suspicious containers for removal to the stationhouse, probably with the householder himself in tow. After considerable delay, the officers would then triumphantly present the startled householder with a warrant authorizing the opening of the containers seized. Innocent householders could be expected to consider this belated appearance of a warrant a nearly useless afterthought. It is hard to see why drivers and passengers should react otherwise.

Thus, given that a warrant is not required to search an automobile in the first place, the incremental protection provided by a warrant requirement applied to containers is minimal. But this alone is insufficient cause to abandon the warrant requirement. When constitutional rights are at stake, even modest additional guarantees should not be forgone unless it is necessary to do so.

2. *When is a Warrant Impractical?* Traditionally, it has been considered necessary to forgo the benefits of a warrant when it is "impractical" to apply to a magistrate to obtain one. The principal reason why it may be impractical for an investigator to get a warrant is that the status quo cannot be preserved during the attendant delay.[112] Because of the element of surprise, it is normally possible to obtain a warrant before searching a dwelling; the occupants usually are not forewarned and are unable to take

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[112] *See, e.g., Carroll* v. *United States*, 267 U.S. 132, 153 (1925) (automobiles); *Warden* v. *Hayden*, 387 U.S. 294, 298-99 (1967) (houses).

evasive action. Situations involving stopped automobiles, however, cannot so easily be frozen while a warrant is obtained. So it has always been held that the warrant requirement does not apply to the search of an occupied automobile.[113]

But why can the situation not be frozen when an automobile is stopped? After all, a temporary seizure while a warrant is obtained could precede the search. Today, the Court answers this question by focusing on the practical difficulties associated with the temporary seizure of a car.[114] But while the first automobile search case decided by the Supreme Court, *Carroll* v.

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[113] *Arkansas* v. *Sanders*, 442 U.S. 753, 760 (1979) ("One of the circumstances in which the Constitution does not require a search warrant is when the police stop an automobile on the street or highway because they have probable cause to believe it contains contraband or evidence of a crime."). Unoccupied automobiles, however, may be treated differently. *See Coolidge* v. *New Hampshire*, 403 U.S. 443, 461-62 (1971).

[114] *Arkansas* v. *Sanders*, 442 U.S. 753, 765 (citation omitted):

> We view, however, the seizure of a suitcase as quite different from the seizure of an automobile. In *Chambers*, if the Court had required seizure and holding of the vehicle, it would have imposed a constitutional requirement upon police departments of all sizes around the country to have available the people and equipment necessary to transport impounded automobiles to some central location until warrants could be secured. Moreover, once seized automobiles were taken from the highway the police would be responsible for providing some appropriate location where they could be kept, with due regard to the safety of the vehicles and their contents, until a magistrate ruled on the application for a warrant. Such a constitutional requirement therefore would have imposed severe, even impossible, burdens on many police departments. No comparable burdens are likely to exist with respect to the seizure of personal luggage.

United States,[115] uses language suggesting that the impracticality of obtaining a warrant derives from the difficulties associated with handling automobiles, *underlying the* Carroll *Court's analysis is the assumption that the source of that impracticality arises from the problems involved in securing the suspects, not their contraband or their vehicle, while a warrant is sought.* It is worth reviewing the basis for the *Carroll* decision.

In *Carroll* the *physical practicality* of seizing the vehicle and the suspects while seeking a warrant could not have been challenged because the vehicle and the suspects in fact *were* seized following the search and taken to a place where a warrant could have been obtained, thus establishing that the police were physically capable of guarding the car, its contents and the suspects while application to a magistrate for a warrant was made. After the warrantless search of the car in *Carroll* for liquor possessed in violation of the Volstead Act, the officers involved "took the two defendants and the liquor and the car to Grand Rapids," [116] the nearest city, a location at which a warrant presumably could have been obtained before the officers tore open the seats of the car to find the liquor concealed inside. The Oldsmobile roadster that carried the liquor in *Carroll* also was impounded as required by the Volstead Act, which specified that "[w]henever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance." [117]

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[115] 267 U.S. 132 (1925).

[116] *Id.* at 136.

[117] *Id.* at 144 (quoting National Prohibition Act, ch. 85, tit. II, § 26, 41 Stat. 315 (1919)).

The vehicle and suspects having been in fact seized in *Carroll*, it is undeniable that, at least in the circumstances of that case, it was physically possible for the officers to have obtained a warrant before they tore open the car seats.

Although Chief Justice Taft's opinion for the *Carroll* Court does not explicate the real source of the problem in that case in full, not much analysis is needed to see the true nature of the difficulty the case presented. When the "Carroll boys" [118] were stopped by police officers on the road from Detroit to Grand Rapids, the officers had neither a legal basis for arresting them nor for seizing their roadster prior to a search. The officers did not have an arrest warrant for Carroll or his accomplices. Under the Volstead Act a first offense was only a misdemeanor, and a warrantless arrest for a misdemeanor required at that time not just probable cause but that the offense had been committed in the presence of the arresting officer.[119] Of course in 1925 it was implicitly understood that there was no half-way "stop" of the type eventually authorized by *Terry* v. *Ohio*.[120] Under the common law rules applicable in *Carroll* there was no room for investigative detention. Thus, the police in *Carroll* had no grounds to arrest or even temporarily to detain the *occupants* of the roadster, and any temporary detention while a search warrant or an arrest warrant was sought would have been unlawful, whatever its physical practicality.

Before the Supreme Court, Carroll and his accomplice Kiro assumed that the search of their car could

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[118] 267 U.S. at 160.

[119] 267 U.S. at 156-58.

[120] 392 U.S. 1 (1968).

only be justified as a search incident to an arrest. On this theory, their arrest could not be justified by the fruits of the search which preceded it, because the search could only be justified as an incident of the subsequent arrest. But an arrest for the misdemeanor with which they were charged could not have been made prior to the search, because the officers had only probable cause, but had not seen the misdemeanor committed in their presence, when they searched the roadster. Because the arrest was unlawful, the search was unlawful, argued Carroll and Kiro,[121] and their conviction had to be overturned. Justice McReynolds, joined by Justice Sutherland, adopted this view in dissent.[122]

Chief Justice Taft writing for the majority, however, held that a warrantless *search*, if not a warrantless arrest for a misdemeanor, could be justified on the basis of probable cause alone.[123] The warrantless search of the roadster was thus independently justified. In effect, Chief Justice Taft turned Carroll's theory on its head, *justifying the arrests as incident to and dependent on the fruits of a warrantless search*, rather than the warrantless search as incident to the arrests. Whereas a warrant would have been required before "a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained," [124] a warrant was not required for "a search of a ship, motor boat, wagon or automobile, *for contraband goods*, [since] it is not practicable to secure a warrant because the

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[121] 267 U.S. at 136-42.

[122] *Id.* at 163 (McReynolds, J., dissenting).

[123] *Id.* at 158-59.

[124] *Id.* at 153.

vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." [125]

But a vehicle can move quickly "out of the locality" only if it *and its driver* are free to go; so plainly and especially on the facts of *Carroll, Chief Justice Taft's unstated assumption is that Carroll would have been free to drive away because it was not legally permissible to detain him and his accomplices while a warrant was sought.* The basis of the *Carroll* decision that a warrant is not required before a search of an automobile on probable cause that it contains contraband thus does *not* rest on the assumption that it is *physically impractical* to seize cars and suspects temporarily while a warrant is sought, but on the quite distinct assumption that *it was legally impossible so to detain the suspects and impound their car.*[126]

Indeed, the Supreme Court itself appears implicitly and perhaps unconsciously to have understood that the impracticality of obtaining a warrant depends not on the difficulty of seizing and guarding an automobile, but on the problems associated with detaining its occupants. Thus six years after *Carroll* the Court upheld a warrantless search of an automobile initiated after the driver had entered it but before he had put it into motion.[127] And another seven years later, the Court endorsed a warrantless search of a car initiated as the driver alighted after it was brought to a halt in a garage.[128] But in *Coolidge* v.

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[125] *Id.* (emphasis added).

[126] *Accord* Wilson, *The Warrantless Automobile Search: Exception Without Justification*, 32 HASTINGS L.J. 127, 131-32 (1980).

[127] *Husty* v. *United States*, 282 U.S. 694 (1931).

[128] *Scher* v. *United States*, 305 U.S. 251 (1938).

New Hampshire,[129] the Court refused to accept a warrantless search of an *unoccupied* car whose owner had already been arrested elsewhere.

Turning to modern day law, we then see that *the real problem with a warrant requirement for automobile searches results from the difficulties temporary detention poses for suspects and the police who must detain them.* Holding suspects for an extended period in limbo with the police will cause vexatious problems for the police, the courts, and not least, for suspects, who, even if guilty, will be denied access to a lawyer and the other rights and protections afforded an arrested person.

I submit that the *treatment of suspects*, not automobiles, should once *again* become *the principal concern* of courts grappling with the auto search exception. The Supreme Court would consistently clarify the aims of the Fourth Amendment were it to state that the relevant impracticality is not that associated with the seizure of cars, but rather that associated with *effectively shifting from patrolman to magistrate the decision whether to intrude massively on the rights of a car's occupants.* From such a changed perspective, it would quickly be perceived that *the warrant requirement is more harmful than helpful*, as I believe experience with the *Sanders* rule ultimately will prove.

In *Carroll* there were legal impediments to the temporary seizure of automobiles and suspects while a warrant was obtained. Those legal impediments, erected to shield citizens from unnecessary or improper detentions, are now rarely applicable. *But the interests of suspects protected by those impediments are as important today as ever. The imposition of a warrant requirement for containers puts those in-*

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[129] 403 U.S. 443 (1971).

terests in jeopardy, because in most situations a warrant requirement implies the temporary detention of suspects. At best, it will present suspects with a cruel choice: consent to a search or be detained while a warrant is obtained.[130] Absent consent to a search

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[130] The difficulties associated with consent searches are considerable. The suspect who consents to a search waives constitutional protections guaranteed by the Fourth Amendment. To be effective such waiver must be free and voluntary. In judging whether such a waiver is truly voluntary, courts look to "all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973). In many circumstances courts have found that apparent consent was not effective. For example, police threats will vitiate consent. *See, e.g., Waldron* v. *United States*, 219 F.2d 37 (D.C. Cir. 1955) (policemen threatened suspect's eighteen-year-old-wife that they would not be responsible for what might happen to suspect's apartment should they be forced to get warrant); *United States* v. *Kampbell*, 574 F.2d 962 (8th Cir. 1978) (officers threaten to ransack home if required to get a warrant). Consent is not effective if it is based on reliance on a policeman's false assertion. *E.g., Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (false claim to have had a warrant). Moreover, consent will not be valid if the suspect reasonably believed that he did not have any option but to consent. *E.g., Bumper* v. *North Carolina*, 391 U.S. 543 (1968) (no consent when search made pursuant to an invalid warrant); *Amos* v. *United States*, 255 U.S. 313 (1921) (consent invalid where extracted by "implied coercion" from suspect's wife by federal agents who said they had come to search for violations of the revenue laws). Indeed, this court has noted that "true consent, free of fear or pressure, is not so readily to be found" when a suspect is confronting the police. *Judd* v. *United States*, 190 F.2d 649, 651 (D.C. Cir. 1951). Most courts, however, do not find consent to have been vitiated when it is granted in response to police threats to obtain a search warrant. For citations and analysis of this problem see Comment, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. CRIMINOLOGY 163 (1980).

on the spot, detention will usually be necessary to ensure that the suspects, if guilty, do not flee. In legal terms, an arrest will be necessary while the warrant is sought; probable cause to search will also provide probable cause to arrest in most instances involving contraband of which possession is criminal.

Here an intriguing problem for the police will arise in the event a warrant does not issue: the determination by a magistrate that probable cause to search did not exist will strongly suggest probable cause to arrest also did not exist. In consequence, a constitutional tort action [131] or an action under 42 U.S.C. § 1983 apparently will then lie against the arresting officer on the basis that the arrest was unconstitutional putting the officer to the test of proving good faith in court.[132] Many officers thus may feel under considerable pressure to obtain consent, rather than be put in jeopardy by attempting to obtain a warrant. One way to get consent may be to threaten not only detention tantamount to arrest, but its trappings as well: booking, incarceration, fingerprinting and so forth. For those who have no criminal record—and who are innocent—the threat of a booking will have a powerfully coercive effect in view of what are widely perceived to be the lifelong consequences of an arrest record. As a result, the characterization of automobile searches as based on "consent" will often ring false.

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[131] *See, e.g., Bivens* v. *Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[132] Officers of the executive branch are immune from liability when their action is reasonable "in light of all the circumstances, coupled with good-faith belief." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974).

With a warrant requirement, we therefore must expect much litigation on what constitutes consent, and how the police may obtain it. These problems will be complicated by the fact that consent will almost invariably result in waiver not only of the warrant requirement but also of the probable cause requirement. Without being unduly cynical about the behavior of police in general, it is possible to predict that some police on some occasions will use the threat of obtaining a warrant, with consequent hours of detention and delay, to obtain consent to searches *not* justified by probable cause. In appropriate circumstances we can then expect courts faced with these situations to rule that "consent" was vitiated by the totality of the circumstances surrounding it.[133] In the face of such rulings, other, well-intentioned, police will become uncertain whether, if they rely on consent, they will destroy their case. At least in important investigations, then, they will become reluctant to accept consent, but will feel compelled to insist on obtaining a warrant when there is ample probable cause, even over the protests of citizens who would just as soon permit an empty suitcase to be opened so they can be on their way.

Worse yet, undisciplined police who wish to harass citizens for whatever reason will be given a potent device to do so: the arrest followed by a predictably fruitless, but long drawn out, attempt to get a warrant. Unfortunately, it will be next to impossible for courts to control this type of abuse without damning the police when they do seek a warrant, as well as when they do not. Chaos in the courts is the most likely result.

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[133] *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) (determination of the voluntariness of consent to an auto search is to be based on the totality of the circumstances).

It is my conclusion that *the warrant requirement is therefore impractical whenever the detention of the suspect during the time required to get the warrant is necessary and not independently justified.* Because this is normally the case whenever a vehicle is stopped on probable cause that it contains contraband, I would therefore *apply the automobile search exception not only to searches of the integral parts of an automobile but to its contents as well.*

3. *The Supreme Court's Views on When a Warrant is Impractical.* The Supreme Court, however, finds its impracticality elsewhere. In *Sanders* it concluded that, while it is not practical for the police to get a warrant before searching a car, it is practical to get a warrant before opening containers inside. The reason provided by the Court [134] for this distinction is that police anywhere can be assumed to have adequate facilities for securing containers, though not all of the nation's police can be expected to have the facilities necessary to secure automobiles. The Court thus focuses, not on the impracticality of shifting to a magistrate the decision whether to intrude on the life of a suspect, but on the impracticality of storing cars.

With all due respect, this explanation of impracticality is itself most impractical and theoretical. For surely we can assume that any police department, no matter how small or rural, can transport and impound vehicles illegally parked or abandoned in hazardous locations. Tow trucks are available everywhere and it is a common experience that police are prepared to resort to them. A "boot" on one wheel and one officer to watch over the car would be en-

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[134] *Arkansas* v. *Sanders*, 442 U.S. 753, 765 n.14 (1979).

tirely sufficient to preserve immobile the auto and its contents. The Supreme Court apparently believes, however, that some small police departments may not be able to supply whatever additional resources are necessary to establish a chain of custody sufficient to secure not only a vehicle but evidence within against tampering while a warrant is sought.

The Court is drawing a fine line here. In fact, the difference between the practicality of obtaining a warrant before searching a car and before searching luggage found inside is small. When a warrant is required before a container is opened, the investigating officer must stop the car, search it for containers capable of concealing contraband, seize the containers and arrest the driver, secure the car, transport the driver to a secure location, and then obtain a warrant. When a warrant is required before an auto is searched, on the other hand, nothing is changed except that the officer also is required to secure the evidence that might be within the car against the possibility of tampering or removal—a task in most cases no more difficult than "seizing" an illegally parked car and protecting it against intrusion by keeping it from the public.

But when a line has to be drawn there is little merit in making the obvious observation that points on either side of the line are separated by very little distance. And once the Court had ruled in *United States* v. *Chadwick* [135] that the warrant requirement applies to luggage but not to cars, it could not avoid deciding whether luggage in a car is or is not subject to the warrant requirement, although in

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[135] 433 U.S. 1 (1977).

Chadwick it sought to do so.[136] It had to draw a line somewhere.

4. *Should* Sanders *Be Distinguished?* Based on the confusion in cases attempting to follow both *Chadwick* and its "clarification" in *Sanders*, it appears that the point chosen by the Court was not the best place to draw the line. In fact, because I believe the emphasis should be changed from the impracticality of impounding cars to the impracticality of shifting to a magistrate the decision to intrude significantly on a citizen's rights, I would not have drawn a line at all. But if a line is to be drawn, it should be clearly and cleanly done so that courts and law officers can know where they stand. Thus, because I believe there should be as little doubt as possible in anyone's mind whether or not a warrant is required, I cannot accept the invitation this present case provides to distinguish *Sanders*—and thus perhaps to add to the confusion.

Although it is tempting, I do not follow the approach suggested but not asserted by Chief Justice Burger (joined by Justice Stevens) in his concurrence[137] in *Sanders*. He suggests *Sanders* might be limited to situations in which the police have probable cause to search luggage and that *Sanders* might not apply to situations in which the police have less specific information about the location of contraband

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[136] *Id.* at 11 ("The Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search . . . ."). A well-known case book describes the automobile search issue as having been "sidestepped" in *Chadwick*. Y. KAMISAR, W. LaFAVE, J. ISRAEL, MODERN CRIMINAL PROCEDURE 352 (5th ed. 1980).

[137] 442 U.S. at 766-68 (Burger, C.J., concurring in the judgment).

within a car. Under such a rule a policeman could search luggage found in a car provided he had probable cause to believe contraband could be found somewhere in the car, but did not have sufficient knowledge the contraband was in the luggage. This suggestion, while it would limit the deleterious impact of *Sanders*, does not seem consistent with or easily integrated within the Court's analysis of the warrant requirement by reference to practicability. The practicability of obtaining a warrant does not turn on the specificity of an officer's knowledge of the location of contraband within a car. An even more telling difficulty with this approach is that it puts the prosecutor in an awkward position: at a suppression hearing he must show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located. This approach thus not only lacks a functional foundation but would be unworkable in practice.

The second principal approach suggested for limiting *Sanders* is that adopted by the dissenters today,[138] who would find some containers too flimsy to support a legitimate expectation of privacy. Their approach also suffers from debilitating defects. First, it does not focus on the problems of the warrant requirement as applied to automobiles, but instead sweepingly withdraws certain classes of containers from all Fourth Amendment protection. This may be unwise and unnecessary. Expectations of privacy do not correlate well with sturdiness; the most intimate and private letter may lovingly be carried in its original—

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[138] *See* the opinions of Judges Tamm, MacKinnon and Robb *ante*.

and now opened—envelope. Moreover, this approach invites endless litigation about what containers are within and what containers are without the ambit of Fourth Amendment protection. In Fourth Amendment law, we need clearer lines and fewer cases.

In sum, I believe that because the Court has chosen to draw a line at luggage, we should respect that line and seek to maintain its clarity and consistency. While I would prefer that the Supreme Court shift its focus from the impracticality of storing evidence to the impracticality of shifting the decision to intrude from the patrolman to the magistrate, until it chooses to do so, if ever, our duty is to carry out its directives. For that reason, I concur in the conclusion reached by the majority concerning the reach of *Sanders* as applied prospectively.

5. *The Contraband Element.* Before turning in Part III of this opinion to consider the adverse impact of the exclusionary rule both in this case and more generally I wish to draw attention here to another significant element to be found in the seminal *Carroll* opinion that has sometimes been overlooked: the weight given the fact that the search was undertaken to locate contraband, not property to which private rights could attach.[139]

In *Carroll* it is noteworthy that Chief Justice Taft emphasized that *the statute authorizing the search at*

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[139] The Court itself noted this close connection between the acceptability of warrantless searches and the suspected presence of contraband some years later in its opinion in *United States* v. *Di Re*, 332 U.S. 581 (1948), in which it pointed out that "[a]n automobile . . . was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband." *Id.* at 586.

issue was primarily directed at the suppression of contraband, and only secondarily at the conviction of its possessors.[140] *It is clear from the opinion that Taft viewed this fact as supporting the legitimacy of warrantless search not incident to a valid arrest* undertaken in furtherance of the statute.[141] And to establish the proposition that warrantless searches of conveyances had long been authorized he pointed to the numerous statutes enacted and enforced since the nation's beginning directed specifically at the suppression of contraband and smuggled goods.[142] Throughout the opinion there is a constant undertone emphasizing that the liquor seized was contraband.

Although Chief Justice Taft does not much elaborate the point, the basis for this emphasis plainly is to be found in the fact that the possessor of contraband has no properly interest in it to counterbalance the government's interest in reclaiming or suppressing it. Of course, at least since *Katz* v. *United States* [143] consolidated the line of cases which had eroded the notion that only contraband, fruits, and instrumentalities of crime, but not "mere evidence," could be seized by the government,[144] we no

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[140] *Carroll* v. *United States*, 267 U.S. 132, 155 (1925) ("Section 26 was intended to reach and destroy the forbidden liquor in transportation and the provisions for forfeiture of the vehicle and the arrest of the transporter were incidental.").

[141] *Id.*

[142] *Id.* at 150-53.

[143] 389 U.S. 347 (1967).

[144] "[T]he premise that property interests control the right of the Government to search and seize has been discredited." *Id.* at 353 (quoting *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967)).

longer think of Fourth Amendment rights solely as incidental to property rights. Fourth Amendment rights are now viewed as vindicating "reasonable expectations of privacy" even in situations in which no property interest exists.[145]

Nonetheless, as the *Carroll* opinion shows, *in determining whether a search with or without a warrant is "unreasonable" under the Fourth Amendment* it is historically and functionally correct to give weight to the fact that *in seeking contraband the government is seeking that which it alone has a right to possess,* whereas when the government seeks "mere evidence" it wishes to obtain that which it normally has no right to possess or control but in which it now claims a superior interest. *There can be no privacy interest in contraband.*

III. We Can Do Better Without the Exclusionary Remedy

It has now been sixty-seven years since the Supreme Court first applied the exclusionary remedy to evidence obtained in violation of the Fourth Amendment alone,[146] and twenty years since the rule

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[145] *Id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' ").

[146] *Weeks* v. *United States,* 232 U.S. 383 (1914). *Weeks* was presaged by *Boyd* v. *United States,* 116 U.S. 616 (1886), *Boyd,* however, had strong Fifth Amendment overtones and in a case involving only the Fourth Amendment, *Adams* v. *New York,* 192 U.S. 585 (1904), the Court adhered to the common-law rule that a court will not consider the method by which competent evidence has been acquired.

was first used against the states.[147] During that period some of our finest judges and lawyers have advanced arguments in support of the rule,[148] so much so that many now reflexively equate zealous concern for cherished Fourth Amendment guarantees with spirited support for the exclusionary rule. Throughout the rule's history, however, others, no less distinguished, have opposed the rule and its extensions.[149]

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[147] *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Earlier in 1949 the Court had held in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that the Fourth Amendment substantive rights are implicit in 'the concept of ordered liberty,' " *id.* at 27 (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)), and therefore enforceable under the Fourteenth Amendment against the states. *Id.* at 27-28. Nonetheless, the Court quite reasonably concluded that the exclusionary remedy was not "an essential ingredient" of Fourth Amendment substantive rights. *Id.* at 29. In 1961 the Court abandoned that limitation, holding the exclusionary remedy applicable to the states in *Mapp*.

[148] *E.g.*, *Olmstead* v. *United States*, 277 U.S. 438, 470 (1928) (Holmes, J. dissenting) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part."); *id.* at 485 (Brandeis, J., dissenting) ("Crime is contagious. If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

[149] *E.g.*, *People* v. *DeFore*, 242 N.Y. 13, 21, 150 N.E. 585 (Cardozo, J.) ("The criminal is to go free because the constable has blundered."), *cert. denied*, 270 U.S. 657 (1926). Dean Wigmore put his opposition to the exclusionary remedy this way: "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you *both* go free. . . . Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.' "

Over the years the arguments pro and con have been well rehearsed and positions have crystallized to the extent that it sometimes appears as though almost any debate over the merits of the rule will likely degenerate into a polarized contest between proponents of the rule who see their adversaries as lamentably insensitive to violations of basic constitutional freedoms and opponents of the rule who, in turn, accuse the rule's supporters of softness on crime and criminals.

Along with the exclusionary rule itself, this stereotyped debate between polarized factions simplistically identified with "law and order" and "individual rights" has become an anachronism we can no longer afford. The assumptions which gave rise to the rule and to the stereotyped positions pro and con are no longer valid. Times and circumstances have changed. The rule should now be abolished, not out of an atavistic and nostalic desire to return to an earlier, more naive era, in which we were content to entrust the protection of individual freedoms to state governments close to the people rather than to the federal judiciary,[150] but rather in frank recognition that the tools now available to federal judges to combat violations of the Fourth Amendment are far more varied and potent than once they were. At one time it could plausibly be argued that the exclusionary

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[150] The first eight amendments to the Constitution were held inapplicable to the states in *Barron* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (Marshall, C.J.) ("Had congress engaged in the extraordinary occupation of improving the constitutions of the several states, by affording the people additional protection from the exercise of power by their own governments, in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.").

rule, with all its glaring defects, was the best remedy that could be fashioned by federal judges, sworn to uphold the Constitution but given only strictly limited powers with which to do so. But this is no longer so. We can now provide better protections against constitutional violations without undercutting our ability to bring criminals to justice. The time has come to relegate the exclusionary rule to history.

A. *Defects of the Exclusionary Rule*

The problems the exclusionary rule poses for those charged with the task of fighting crime are plain enough not to require elaboration here.[151] Nor is it necessary to add that those problems are unnecessarily compounded when, as the majority has done in the present case, overly zealous courts exclude evidence obtained by a police officer whose actions cannot be faulted on the law established at the time. The excesses in which the majority today indulges, however, are not an inevitable concomitant of the exclusionary rule, and, in fairness, should not be charged against it. But even when the rule is propery applied, it can be an imposing obstacle to the policeman and the prosecutor.

To be sure, the case can be overstated. At least in principle, the rule denies the prosecutor only evidence he would anyway not have had if the police had kept within the bounds of the Constitution. Even so, too many prosecutions, like the prosecution of Albert Ross, have gone awry, not as a result of intentional police misconduct, and certainly not be-

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[151] *See* Wilkey, *The exclusionary rule: why suppress valid evidence?* 62 JUDICATURE 215 (1978); Wilkey, *A call for alternatives to the exclusionary rule: let Congress and the trial courts speak, id.* at 351 (1979).

cause of any doubt about the guilt of the criminal, but simply because a court, with the benefit of time to reflect and of hindsight, concludes that an officer acting under pressure in the field, maybe under fear for his own life, failed properly to apply the often confused and confusing standards of conduct set out by courts interpreting the Constitution.[152]

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[152] The exclusionary remedy applies whether or not the officer involved acted in good faith. This is anomalous in view of the fact that an officer of the executive branch who acts in good faith is immune to civil liability. Thus, for example, a suspect whose innocence is later proved at trial cannot recover damages against the arresting officer if the arrest was based on probable cause. *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose betwen being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). Similarly, an officer is not liable for damages if he acts under a statute later held unconstitutional either on its face or as applied, provided at the time of his actions he reasonably believed the statute to be valid. *Id.* The rule generally is that officers of the executive branch are immune from liability whenever their actions are made in good faith and are reasonable in light of all the circumstances. *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974). The immunity of executive branch officials for the consequences of their good-faith reasonable actions is predicated on the assumption that "it is better to risk some error and possible injury from such error than [for such officials] not to decide or act at all." *Id.* at 242. As Justice White pointed out in his dissent in *Stone* v. *Powell*, 428 U.S. 465, 541-42 (1976); "If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf. He is not at all recompensed for the invasion by merely getting his property back. It is often contraband and stolen property to which he is not entitled in any event. He has been charged with crime and is seeking

Unfortunately perhaps, when that happens it is the criminal suspect, not the officer, who is before the court. So the court cannot punish the officer. Under the dictates of the exclusionary rule, the court instead punishes the public by releasing a potentially dangerous criminal to resume his criminal depredations. Suffice it to say that the absurdity of this result, if obscure to those whose legal training clouds their judgment, is manifest to most lay people.[153]

Rather than dwell on what should be plain to everyone, I would like to emphasize other, perhaps less obvious but equally unfortunate, consequences of this outmoded rule. First, the rule diverts resources allocated to the criminal justice system from the trial of criminals to the trial of the police.[154] In-

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to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied."

[153] And to those in foreign common-law jurisdictions. Neither the English nor the Canadian legal systems have adopted the rule. Martin, *The Exclusionary Rule Under Foreign Law—Canada*, 52 J. CRIM. L.C. & P.S. 271 (1961); Williams, *The Exclusionary Rule Under Foreign Law—England*, 52 J. CRIM. L.C. & P.S. 272 (1961).

[154] About one third of federal defendants going to trial file Fourth Amendment suppression motions; most of these have formal hearings on these motions. COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. GGD-79-45 (19 April 1979). Because most criminal justice is meted out by the states, and because state officers are frequently less well trained and effectively disciplined than federal officers, the true impact of the exclusionary remedy may be mostly at the state rather than the federal level.

nocent criminal defendants may therefore be denied a real chance for a fair trial at least in part because the limited resources available have been diverted to consideration of exclusionary rule questions. These innocent defendants represent a class victimized by the exclusionary rule which often goes unnoticed because attention normally is focused on the boon the rule provides to the guilty. Of course, many a guilty man owes his freedom to the rule; the assumption underlying the rule is that holding the police in check is more important than holding criminals in check, whatever the common experience of city dwellers might be to the contrary. *Innocent* defendants, however, may, with the public, be indirect victims of the rule.

To understand how the innocent defendant is victimized by the diversion of scarce resources from criminal trials to police discipline, it is necessary briefly to consider how our criminal justice system now operates in fact, if not in theory. The health of the criminal justice system depends in large measure on the quantity and quality of the resources committed to it. Experience unfortunately has shown that the polity is unwilling to devote more than a rather small share of the gross national product to criminal justice. Nonetheless, we in the United States profess to have only the highest ideals when it comes to what we will openly tolerate as a minimum level of due process in criminal adjudication. Moreover, under our constitutional scheme, we have delegated the task of defining that minimum acceptable level of due process principally to the judiciary. But judges work piecemeal and without responsibility for the sacrifices that must be made elsewhere whenever they "purchase" an additional element of due process

by holding that it is an indispensable element of a fair trial. This ensures that more due process will be required than the system can afford to pay for. As a result, trials have now been priced too high to be held in most circumstances; usually neither the defendant nor the government can afford to carry the criminal justice process through to its supposed natural conclusion in a full-blown, well prepared trial.[155]

Instead, we have come increasingly to rely on an informal system of negotiated settlements in the form of plea bargained arrangements betwen prosecutor and defendant. The results are woeful. Criminals guilty of grievous offenses routinely are permitted to escape with convictions for crimes far less serious carrying only wristslapping penalties.[156] Meanwhile innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge; the dire consequences of recalcitrance in bargaining often pose too great a

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[155] *See generally* L. WEINREB, DENIAL OF JUSTICE 71-86 (1977). A recent report under the headline *"99% of Felony Arrests in the City Failed to Bring Terms in State Prison"* in the *New York Times* provides a dramatic example of our current plight. The article explains that "[T]he 100,000 felony cases each year enter what the Mayor's criminal justice coordinator, Robert G. M. Keating, describes as a 'huge felony funnel,' in which they must vie for limited prosecutorial and court resources. . . . [L]aw enforcement officials have decided to treat all but the most serious offenses as misdemeanors, more often than not by a plea agreement reaching during arraignment." N.Y. Times, 4 Jan. 1981, Section 1, at 1.

[156] In New York City, "[T]he chance of a given felony arrest ending in a sentence to state prison is about 1 of 108, according to statistics compiled by the Police Department." N.Y. Times, 4 Jan. 1981, Section 1, at 1.

risk to an innocent defendant who fears he may be erroneously convicted after a trial conducted by an ill-compensated and ill-prepared defense lawyer.[157]

It is against this background that we must measure the diversion of energy, talent and dollars from the central task of fairly determining the guilt and innocence of defendants into the work of adjudicating whether the police have blundered. Plainly, what we have in the way of prosecutors, judges and legal aid attorneys has been spread too thin to permit the allocation of these scarce resources to the discipline of the police. That function should be performed elsewhere and by others. The exclusionary remedy thus literally buys what little in the way of Fourth Amendment protection it affords at the cost of more trials for criminal defendants. Even if the rule did a fair job of promoting Fourth Amendment values, this would be at best a questionable bargain.

But in fact, far from enhancing Fourth Amendment guarantees, in the long run the exclusionary remedy undoubtedly erodes Fourth Amendment protections. If one were diabolically to attempt to invent a rule sure slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule. Every trial lawyer understands how much easier it is to get a favorable ruling on the law if the facts of your case are attractive and your client, cosmetic. But the exclusionary rule neatly assures that nearly every Fourth Amendment question litigated involves unsavory facts and disreputable clients. Often, a

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[157] The Supreme Court has said that it is constitutionally permissible to accept a guilty plea from a defendant who protests his innocence. *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

ruling favorable to a broad reading of the Fourth Amendment will result in the freeing of a criminal plainly guilty of the most heinous offenses to prey once more on the public. Courts are not unaware of the consequences of their rulings; judges cannot help but strain to avoid such an outcome if possible. So whatever short term benefits the rule might achieve by way of additional compliance must be more than counterbalanced by a slow but certain narrowing of the substantive reach of the Fourth Amendment.[158]

B. *The Rule's Supposed Advantages*

The exclusionary rule thus gratuitously frees criminals to prey on the public, worsens the plight of innocent defendants by reducing the chances that adequate resources will be available to afford them a fair trial, and contributes to the gradual erosion of substantive rights under the Fourth Amendment. What can be said in its favor?

The usual explanation for the exclusionary rule is that it removes whatever incentive there might otherwise be to unconstitutional police conduct, by denying the government the fruits of unlawful searches and seizures.[159] This explanation is sometimes summarized by saying that the rule serves as a deterrent to police misconduct, though that is not

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[158] Indeed, we can see this process at work in the case before us in which my dissenting colleagues have suggested that the Fourth Amendment does not protect privacy interests in some containers less sturdy than luggage. *See* opinion of Judge Tamm *ante*.

[159] *E.g., Elkins* v. *United States*, 364 U.S. 206, 217 (1960) (The exclusionary rule's "purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

strictly true in most cases even in theory.[160] Not only does the rule fail to levy a penalty directly on the offending officer who violates the Fourth Amendment, but, even assuming that officers can be directly motivated by a penalty levied against the prosecutor whose case is weakened by the rule's operation, in most instances had the officer not acted unconstitutionally the suspect would not even have been arrested and the policeman would not have "cleared" his case. On the other hand, even under the exclusionary rule, when an officer acts unconstitutionally, though a conviction may not ultimately result, he nonetheless makes an arrest and "clears" his case. So an officer's choice often may be between on the one hand no trophy in the form of an arrest but no violation of the Constitution either, and, on the other hand, a cleared case but perhaps an unclear conscience about the methods required to clear it. The possibility of a conviction may be remote either way.[161]

In fact, in view of the remarkably low fraction of felony defendants who wind up in jail, experienced officers may well view a jail sentence that follows an

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[160] The empirical basis of the rule is the subject of extended and inconclusive debate. For a sample of the scholarly literature on this question see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Canon, *Is the Exclusionary Rule in Failing Health?, Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States *v. Calandia*, 69 NW. U.L. REV. 740 (1974).

[161] *See* notes 155-56 *supra*.

arrest as a rare, random and unexpected occurrence. If so, the exclusionary rule will be simply immaterial to their conduct, which in any event is not predicated on much hope for eventual conviction and imprisonment of the offender.

Whether the rule in fact reduces the incidence of police misconduct is a matter of continuing empirical dispute; there is evidence that it does not, but it is probably fair to say that the question has not been definitively answered and probably never will be.[162] And because the impact of the rule falls on the prosecutor, not on the policeman, it is hard to see why in theory the rule could be more than marginally effective. The government is not a monolith; in most jurisdictions the policeman and the prosecutor belong to separate bureaucracies. Actions taken against one may not even be effectively communicated to the other.

However, uncertain is the rule's efficacy in eliminating unconstitutional behavior by the police, it *is* clear that the rule is likely to discourage the type of internal disciplinary action by police supervisors that would be far more effective in regulating police behavior than the rule itself. With the rule in place, any internal discipline of a police officer is sure to have the incidental effect of sabotaging the prosecution's case before it begins. A prosecutor armed only with evidence of dubious value because it is the fruit of a search of doubtful unconstitutional validity, may still be able to obtain a plea-bargained conviction on a lesser offense. But if, by disciplining the policeman, the government admits the unconstitutionality of the search, even this chance evaporates. While the rule is based on the assumption

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[162] *See* note 160 *supra*.

that disciplining the police is more important than chastising criminals, few police supervisors are likely to share this assumption. Effective internal discipline is thus shortcircuited. In sum, the rule's value in reducing the incidence of unconstitutional police behavior is at best doubtful. At worst, the rule may actually be counterproductive.

Moreover, even assuming, as I am not prepared to do, that the rule is of some marginal benefit in removing an incentive to police misconduct, at present its penalty is administered with a sense of proportionality reminiscent of those medieval penal systems that prescribed capital punishment for everything from pickpocketing on up. The rule falls mercilessly on evidence deemed to have been seized unconstitutionally, without regard for the gravity of the police misconduct or the seriousness of the crime of which the defendant has been charged. Even if the policeman's actions were only marginally in violation of the Constitution despite his good faith while the criminal is guility of rape and murder, still the evidence stays out. Such a disproportion would be regarded as barbaric if used to deter crime; ironically, employed to deter the police many apparently consider it "progressive."

Perhaps the rule's most serious flaw, however, is that *it is available only to the guilty who may thereby escape conviction.* An innocent citizen whose rights are infringed can receive no benefit from the exclusionary remedy. He must be a provably guilty criminal to take advantage of it.

C. *Where Can We Go From Here?*

With these long-recognized defects, it is hard to understand how the rule has survived. The reason, I

think, is that the rule, with all its faults, has been perceived as the *only* remedy federal judges and justices could fashion unaided by the legislature or the executive. In the past the federal judiciary has been relatively powerless to set up effective deterrent mechanisms to check police abuses. So federal judges who took serious their oath to uphold the Constitution may have felt compelled to grasp at the straw of the exclusionary rule to carry out their duty in what they perceived as the only way they could. Certainly the last refuge of the rule's supporters has always been that better, more appropriate remedies historically have not been forthcoming from those in the coordinate branches of the government who do have the power to fashion more effective tools to deal with the problem of police abuse.[163]

I would argue that the existence of the exclusionary rule itself has retarded the development of alternative remedies by the legislative or executive branches. But whether or not I am correct in this judgment, as a result of recent decisions the federal judiciary no longer is dependent on the coordinate branches to fashion better remedies. More potent and effective measures are now at our disposal as a result of recent changes in the law.[164]

in particular, effective tort remedies in federal court could now be developed—and to some degree are already available—to check police abuses, and could be further strengthened by court decisions without

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[163] *See, e.g.*, Kamisar, *The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than 'an empty blessing,'* 62 JUDICATURE 337 (1979).

[164] *See, e.g.*, Wilkey, *A call for alternatives to the exclusionary rule: let Congress and the trial courts speak*, 62 JUDICATURE 351 (1979).

legislative or executive assistance. The key here is the resurrection of 42 U.S.C. § 1983 for the redress of constitutional violations by state officials,[165] coupled with the imposition of vicarious liability on state governmental units for the actions of their agents.[166] Taken together, these developments in civil rights law provide not only a federal forum but a state pocket deep enough to assure adequate compensation for and deterrence of Fouth Amendment violations.

Other than the all-too-obvious faults of the exclusionary rule itself, there are several reasons why lawyers and courts interested in the vindication of Fourth Amendment rights should turn away from the exclusionary rule toward the development of effective tort remedies.

Most obvious is the fact that *a tort remedy compensates the victim* of a Fourth Amendment violation, while the exclusionary rule acts solely as an ill-conceived deterrent to future violations whose windfall incidental benefits are made available only to those charged with crime. The exclusionary rule merely deters, and when that deterrence fails, as it almost always must, no compensation is forthcoming for the victims. An effective tort remedy not only deters, but also compensates the victim when and if deterrence fails to achieve lawful police conduct.

Second, the tort remedy has the advantage that it could depend on jury decisionmaking rather than judicial decisionmaking. Judges have been notably unsuccessful in their effort to create a body of principled and coherent rules on which the police can rely to determine the reasonableness of a search with or without a warrant under the Fourth Amendment.

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[165] *Monroe* v. *Pape*, 365 U.S. 167 (1961).

[166] *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978).

The circumstances under which searches are made vary too greatly and the number of relevant factors is too large to permit the "reasonable" search to be captured adequately in a few understandable and administrable rules. What is "reasonable" in one community at one time may not be "reasonable" in another community at another time. Juries drawn from the very community affected by both police abuses and criminal attacks could be expected to provide better and surely more popularly acceptable resolutions of Fourth Amendment cases, just as juries rather than judges traditionally have been expected to provide more accurate and more acceptable resolutions of disputes over what constitutes negligence in the multitude of concrete circumstances that arise. Just as with negligence actions, of course, constitutional tort actions decided by juries would be subject to the usual array of devices designed to control jury decisionmaking to ensure that it remains within the bounds of the rational and the lawful. Among other tools, jury instructions, directed verdicts and judgments notwithstanding the verdict, would be as available for constitutional tort actions as they are for negligence tort actions.

Verdicts by juries composed of peers drawn from the affected communities would not go unnoticed either by police officials or by their supervisors and would effectively deter police misconduct in a way the exclusionary rule will never do. Nor could the police as easily disparage the judgments of their fellow citizens as they can that of appointed judges. At the same time, we can count on juries composed of citizens who live in a community to understand the realities and dangers of life in that community better than judges may and more accurately to evaluate

the conflicting claims of reasonableness and unreasonableness of the police and of the aggrieved subject of a search.

I do not underestimate the difficult questions of law, particularly in the area of damages, that must be answered before such a tort system could be considered well developed and mature. But the problems should be no more difficult than those posed by the crush of exclusionary rule cases now clogging the courts. And while the exclusionary rule cannot ever be expected to work, a tort system aimed at the twin goals of reasonable compensation and deterrence might well provide a way out of our current Fourth Amendment difficulties. The time has come to replace the exclusionary rule and replace it with a more effective alternative. Both tasks are within the reach of judges and justices.[167] There is no reason to wait any longer.

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[167] Congressional action surely would be preferable. The congressional silence following Chief Justice Burger's call for such legislation, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting), however, has been thundering.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Criminal No. 78-698

No. 79-1624

UNITED STATES OF AMERICA

v.

ALBERT ROSS, JR., APPELLANT

Filed Mar. 31, 1981

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN, Chief Judge, WRIGHT, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel before the Court sitting *en banc*.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is remanded to the District Court for further proceedings not inconsistent with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: March 31, 1981
Opinion for the Court filed by Circuit Judge Ginsburg
Opinion, dissenting in part, filed by Circuit Judge Tamm
Dissenting opinion filed by Circuit Judge MacKinnon
Dissenting opinion filed by Circuit Judge Robb
Dissenting opinion filed by Circuit Judge Wilkey

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624

UNITED STATES OF AMERICA

v.

ALBERT ROSS, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Criminal No. 78-698)

Argued December 7, 1979

Decided April 17, 1980

Before BAZELON, *Senior Circuit Judge*, TAMM, *Circuit Judge*, and HAROLD H. GREENE,* *United States District Judge for the District of Columbia.*

Opinion for the court filed by *Circuit Judge* TAMM.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* BAZELON.

TAMM, *Circuit Judge*: With this case we must decide whether law enforcement officers must obtain

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

a search warrant before opening a closed paper bag or a closed leather pouch lawfully seized from the trunk of an automobile that the officers have probable cause to believe contains narcotics. We conclude that under the circumstances of this case, the defendant did not have a reasonable expectation of privacy in the contents of the paper bag once the bag was in police hands; the warrantless search of the paper bag, therefore, was permissible. A pouch, however, is a form of luggage and the police must have a warrant to search such an item. Because the conviction of the defendant in this case rested on evidence obtained from both containers, we must reverse that conviction and remand for a new trial at which items taken from the paper bag, but not from the leather pouch, may be admitted.

I

On November 27, 1978, Detective Charles Marcum of the Metropolitan Police Department in Washington, D.C., received a telephone call from an informant who on prior occasions had provided reliable information about trafficking in narcotics that had led to seizures and arrests. The informant told Marcum that he had observed a man known as "Bandit" selling narcotics in front of 439 Ridge Street, N.W., in Washington. The informant reported that the drugs were in the trunk of Bandit's automobile, a 1978 "purplish maroon" two-door Chevrolet Malibu with District of Columbia license plates. The informant also provided a detailed description of Bandit himself.

Detective Marcum, Detective David Cassidy, and Sergeant Raymon Gonzales drove to Ridge Street where they observed a car matching the informant's

description. A radio check revealed that it was registered to an Albert Ross, Jr., who previously had used the alias of "Bandit." The police officers circled the block twice, then spotted the defendant driving the car. After stopping the vehicle and identifying themselves, the police asked Ross to step out of his car. Ross matched the description the informant had given Marcum. As Marcum conducted a body search, Gonzales observed a round of ammunition on the car's front seat. He looked for a pistol and found one in the glove compartment. Marcum arrested Ross and handcuffed him. Though the defendant offered evidence to the contrary, the police officers claim that Cassidy next searched the auto's trunk, where he found a closed but unsealed "lunch-type" brown paper bag and a closed red leather pouch or handbag. Cassidy opened the paper bag and discovered thirty glassine envelopes containing a white powder.[1] He left the bag and the pouch in the trunk, and the officers drove the car back to police headquarters. At the station, and still without having obtained a search warrant, Cassidy sent the glassine envelopes to the police laboratory for analysis. He opened the red pouch and found $3,200 in currency; the laboratory later reported that the glassine envelopes contained heroin.

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[1] Ross offered testimony that the officers did not open the paper bag until they returned to the police station. Inasmuch as our decision does not depend upon the existence of exigent circumstances to justify the warrantless searches in question, we need not decide whether the district court found that the police opened the paper bag at the time of arrest, as the officers testified. There is no dispute, however, that Detective Cassidy waited to open the red leather pouch until he returned to the police station.

A federal grand jury in the District of Columbia indicted Ross on December 19, 1978, for possession of heroin, possession of heroin with intent to distribute, carrying a pistol without a license, and possessing a firearm after a felony conviction. Ross moved to suppress the evidence obtained from the search of the paper bag and the leather pouch. After an evidentiary hearing, the district judge denied the motion. A jury trial followed, and on March 21, 1979, Ross was convicted of possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a) (1976). Ross appeals his conviction.

II

Ross's initial argument is that the police lacked probable cause to stop and search his car. We disagree. Under *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), probable cause may be based on the information supplied by an informant if the informant was credible and he obtained his information in a reliable way. *See United States* v. *Davis*, Nos. 78-2246 & 78-2247, slip op. at 30 (D.C. Cir. Oct. 26, 1979). One method of discovering an informant's credibility, that is, his truthfulness, is to examine his "track record" in providing police with accurate information. *Id. See Aguilar* v. *Texas*, 378 U.S. at 114 n.5. Here, undisputed testimony indicates the officers knew that this informant had supplied accurate information on prior occasions. Moreover, there is no challenge to the method in which the informant came upon his information: he was an eyewitness to actual sales of narcotics. Under these circumstances, we believe it clear that the police had probable cause to stop Ross and to search his car.

III

Not only did the police have the necessary probable cause, but under *Carroll* v. *United States*, 267 U.S. 132 (1925), and *Chambers* v. *Maroney*, 399 U.S. 42 (1970), the officers lawfully could search Ross's automobile, including its trunk, without a warrant. *See United States* v. *Hawkins*, 595 F.2d 751, 753 (D.C. Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 910 (1979). Our only concern then is with the permissibility of the warrantless search of the containers they found in the trunk.

The fourth amendment dictates that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). A search warrant represents more than a formality or technicality. "The mere reasonableness of a search, assessed in light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment." *Id. See United States* v. *Chadwick*, 433 U.S. 1, 8 (1977); *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948). Moreover, the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare, and that the few recognized exceptions must be "jealously and carefully drawn . . . ." *Jones* v. *United States*, 357 U.S. 493, 499 (1958). *See also United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).

Analysis of fourth amendment protection begins with the person making claim to that protection. Fourth amendment rights are not intrinsic attributes of a container or any other object. Instead, "rights assured by the Fourth Amendment are personal rights . . . [that] may be enforced by exclusion of evidence only at the instance of one whose own

protection was infringed by the search and seizure." *Simmons* v. *United States*, 390 U.S. 377, 389 (1968), *quoted in Rakas* v. *Illinois*, 439 U.S. 128, 138 (1978). *Accord, Alderman* v. *United States*, 394 U.S. 165, 174 (1969). The defendant must establish that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978). *See id.* at 130 n.1.

To test whether the police officers' search of either the paper bag or the leather pouch invaded interests of Ross protected by the fourth amendment, we look to the expectation-of-privacy standard first enunciated in *Katz* v. *United States*, 389 U.S. 347 (1967), especially Justice Harlan's concurrence, *id.* at 360-62. *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Rakas* v. *Illinois*, 439 U.S. at 143. An interest is protected if two elements are present. First, as a subjective aspect, the defendant actually must have expected the preservation of his privacy. *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring). Thus if the accused intentionally displayed the contents of his automobile to the police, he obviously did not expect the contents to remain hidden from police view. *See id.* at 351 (majority opinion). Second, as an objective aspect, the defendant's expectation must be one that society is prepared to recognize as reasonable. That is, the defendant must have relied justifiably on a freedom from governmental intrusion. *Id.* at 361 (Harlan, J., concurring).

In most cases, the extent of expectation that is reasonable will depend upon the circumstances at the time of the search. The Supreme Court has taken several factors into account: the precautions taken to preserve privacy, the manner in which the person

claiming fourth amendment protection has used the place or item searched, the treatment accorded that place or item at the time the Framers adopted the fourth amendments, and finally, the applicable property rights. *See Rakas* v. *Illinois*, 439 U.S. at 152-53 (Powell, J., concurring) (summarizing earlier cases). For example, a lower expectation may be justified when the defendant no longer possesses the searched item. Both the majority and the dissent in *Rakas* acknowledged that "perhaps the Constitution provides some degree less protection for the personal freedom from unreasonable governmental intrusion when one does not have a possessory interest in the invaded private place." *Id.* at 166 (White, J., dissenting), *quoted with approval in id.* at 146-47 (majority opinion). Similarly, the Supreme Court has held in automobile cases that the characteristics of cars, the manner of their use, and the degree of their regulation dilute the justifiable expectation of privacy. *See Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). *Accord, Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979).

In this case, however, we are not dealing with the search of a car but with the search of two containers. Our inquiry must focus on the reasonable expectation of privacy Ross had in the paper bag and the leather pouch. The contents of some containers, those the Supreme Court refers to as "common repositor[ies] for personal effects," are entitled to an expectation of privacy regardless of their location or the right to possess them. *Arkansas* v. *Sanders*, 442 U.S. 753, 763-66 (1979). Luggage, such as a footlocker or a suitcase, "is inevitably associated with the expectation of privacy." *Id.* at 762 (emphasis added). Because society recognizes luggage as a personal sanc-

tuary, its presence within a car or its having fallen lawfully into public hands does not alter the reasonableness of an expectation that it will not be opened by the police. *Id.; Rakas* v. *Illinois*, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring). Professor Wayne LaFave has observed that "[i]n *Chadwick*, the Court was able to say that the 'substantial infringement with respondents' use and possession' of the footlocker, justified by exigent circumstances, 'did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.'" 2 W. LAFAVE, SEARCH AND SEIZURE § 5.5, at 365 (1978) (quoting *United States* v. *Chadwick*, 433 U.S. 1, 13 n.8 (1977)). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*). *Cf. Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (per curiam) (Court examines the legality of ordering the driver of a stopped vehicle out of his car by looking to the incremental invasion of privacy, given the stop).

The same circumstances that justified the search of Ross's automobile also justify a warrantless seizure of the paper bag and leather pouch, thereby depriving Ross of some of his possessory rights, at least temporarily. Our focus shifts to whether Ross reasonably could expect that after the bag and pouch were seized by the police, these containers nevertheless would remain unopened. In differentiating fourth amendment treatment of containers, parcels, and packages from that of personal luggage, the *Sanders* Court stated that although the need for a warrant to search nonluggage does not depend "upon whether they are seized from an automobile," [2] not all con-

[2] Consequently, the police may not capitalize on a container's monetary presence in a vehicle as a pretext for search-

tainer types "deserve the full protection of the Fourth Amendment." *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979). The Court left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched. We must therefore determine whether a paper bag or a leather pouch may be searched immediately after their proper seizure, or if, like luggage, they may only be impounded until the police officers can obtain a warrant to search them. *See id.* at 772 (Blackmun, J., dissenting).

IV

We hold that absent unusual circumstances not present here, the fourth amendment does not forbid the police from opening a paper bag once it is properly in their hands. After analyzing the privacy expectation in a paper bag lawfully seized by police, we conclude that the fourth amendment does not protect any privacy interest in a closed but unsealed paper bag over and above the privacy justified by virtue of possession and control.

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ing the container without a warrant. In *Chadwick*, the Court disallowed the opening of a footlocker that the police had not attempted to search, although they had probable cause to do so, until the defendant stowed the footlocker in the trunk of a car. In *Sanders*, the police had probable cause to search Sanders' suitcase before it was placed in the taxicab trunk, *see* Arkansas v. Sanders, 442 U.S. 753, 766 (1979) (Burger, C.J., concurring in the judgment), but the police chose to wait. Nevertheless, although storing a container in a car does not suddenly strip the owner of his legitimate expectation of privacy in the container's contents, the presence of a container in an automobile may allow the police to discover and take possession of the container without a search warrant.

In traveling to this conclusion, we are fortunate that a portion of our path has been illuminated by the federal and the state courts that have already dealt with related situations. In general, invalidation of warrantless searches has been confined to the types of containers normally associated with personal luggage: a suitcase, a briefcase, a purse, a duffle bag, a backpack, a gym bag, a vinyl satchel, or a guitarcase.[3] On the other hand, courts generally have

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[3] (1) *Suitcase*: United States v. Montano, 613 F.2d 147 (6th Cir. 1980) (per curiam); United States v. MacKay, 606 F.2d 264 (9th Cir. 1979); State v. Crutchfield, 123 Ariz. 570, 601 P.2d 333 (Ariz. Ct. App. 1979); Haughland v. State, 374 So. 2d 1026 (Fla. Dist. Ct. App. 1979); Buday v. State, 150 Ga. App. 686, 258 S.E.2d 318 (1979); State v. Gauldin, 44 N.C. App. 19, 259 S.E.2d 779 (1979); West Virginia v. Tomey, No. 14007 (W.Va. Oct. 16, 1979). *Cf.* United States v. Tralik, 611 F.2d 343 (10th Cir. 1979) (warrant to search car); State v. DeRusha, 74 Ill. App. 3d 641, 393 N.E.2d 619 (1979) (search permitted due to exigent circumstances); People v. Plantefaber, 91 Mich. App. 764, 283 N.W.2d 846 (1979) (exigent circumstances).

(2) *Briefcase*: United States v. Presler, 610 F.2d 1206 (4th Cir. 1979); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979) (dictum); *In re* B.K.C., No. 13779 (D.C. Jan. 9, 1980); Webb v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979); Araj v. State, 592 S.W.2d 603 (Tex. Crim. App. 1979). *Cf.* United States v. White, 607 F.2d 203 (7th Cir. 1979) (exigent circumstances); United States v. Calendrella, 605 F.2d 236 (6th Cir.) (*Chadwick* not applied retroactively), *cert. denied*, 100 S. Ct. 522 (1979); United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) (search incident to arrest); State v. Daniel, 589 P.2d 408 (Alas. 1979) (inventory search, decision based on Alaska constitution).

(3) *Portfolio*: United States v. Miller, 608 F.2d 1089 (5th Cir. 1979).

[Footnote continued on page 130a]

found warrantless searches permissible when confronted with containers dissimilar to luggage: an integral part of an automobile, an open knapsack, a taped electric razor case, a toolbox, a closed but un-

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[3] [Continued]

(4) *Purse*: Ulesky v. State, 379 So.2d 121 (Fla. Dist. Ct. App. 1979).

(5) *Wallet*: Cf. State v. Hlady, No. 79-165-C-2, CA 14189 (Or. Dec. 31, 1979) (search permitted as being incident to arrest).

(6) *Duffle bag*: United States v. Johnson, 588 F.2d 147 (5th Cir. 1979).

(7) *Backpack*: United States v. Meier, 602 F.2d 253 (10th Cir. 1979).

(8) *Gym bag*: State v. Marcum, 24 Wash. App. 441, 601 P.2d 975 (1979). *Cf.* State v. Hassapelis, 404 A.2d 232 (Me. 1979) (harmless error).

(9) *Tote bag*: People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, *cert. denied*, 100 S.Ct. 181 (1979).

(10) *Travel bag*: People v. Little, 598 P.2d 140 (Colo. 1979) (en banc).

(11) *Guitar case*: United States v. Bella, 605 F.2d 160 (5th Cir. 1979) (per curiam).

(12) *Camera case*: State v. DeLong, 43 Or. App. 183 (1979) (decided under combination of *Sanders* and Oregon precedent).

But see State v. Dalton, 24 Cal. 3d 850, 598 P.2d 467, 157 Cal. Rptr. 497 (1979) (closed metal box), *cert. denied*, 48 U.S.L.W. 3611 (U.S. Mar. 24, 1980).

Though in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979), the court held that a warrant was necessary to search three large cardboard boxes, the court predicated its conclusion on its findings that the use of plastic tape to seal the boxes and the secreting of the boxes behind covered windows "manifested an expectation that the contents would remain free from public examination." *Id.* at 1045.

sealed department store box, or a closed but unsealed envelope.[4]

Several courts have looked at paper bags in particular, and have concluded a search is permissible after their seizure. In *United States* v. *Andrews*, No. 79 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979), an undercover agent had seen a brown paper bag and a vial of clear liquid, taken from the bag, which had been identified as the "juice." Later, after surveil-

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[4] (1) *Integral part of the automobile*: United States v. Dall, 608 F.2d 910 (1st Cir. 1979) (camper cap).

(2) *Unlatched knapsack*: State v. Schrier, 283 N.W.2d 338 (Iowa 1979).

(3) *Closed satchel*: United States v. Milhollan, 599 F.2d 518 (3d Cir.), *cert. denied*, 100 S.Ct. 221 (1979) (three Justices would have granted the writ and reversed under *Sanders*).

(4) *Taped electric razor case*: Cooper v. Commonwealth, 577 S.W.2d 34 (Ky. Ct. App. 1979).

(5) *Closed but unlocked toolbox*: Wyss v. State, 262 Ark. 502, 558 S.W.2d 141 (1977).

(6) *Closed but unsealed department store box*: United States v. Neumann, 585 F.2d 355 (8th Cir. 1978) (inventory search permitted because boxes cannot be closed securely).

(7) *Envelopes*: United States v. Duckett, 583 F.2d 1309 (5th Cir. 1978).

(8) *Plastic bags*: United States v. Gooch, 603 F.2d 122 (10th Cir. 1979); United States v. Ficklin, Nos. 77-2923 & 77-3220 (9th Cir. Feb. 10, 1978) (memorandum) (plastic and burlap bags), *cert. denied*, 439 U.S. 925 (1978), *quoted in* United States v. Stevie, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 3102 (1979); Flynn v. State, 374 So.2d 1041 (Fla. Dist. Ct. App. 1979).

(9) *Paper bags*: United States v. Vento, 533 F.2d 838 (3d Cir. 1976); United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. Nov. 2, 1979) (approved without discussion although *Sanders* cited elsewhere in opinion); Clark v. State, 574 P.2d 1261 (Alas. 1978); Webb. v. State, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979) (dictum).

lance, police arrested the driver of a car. While searching the car's trunk, the arresting officer observed a brown paper bag. Searching the paper bag, the officer found the vial previously shown to the undercover agent. Although citing *Arkansas* v. *Sanders*, the court denied a motion to suppress without discussing the warrantless search of the bag. In *Clark* v. *State*, 574 P.2d 1261 (Alas. 1978), a search of defendant's rental car uncovered a paper bag in the glove compartment. Still without a warrant, the police officer opened the bag and discovered it contained narcotics. Affirming Clark's conviction, the Alaska Supreme Court compared this case with *Chadwick* and concluded that the expectation of privacy was much lower in a paper bag's contents than in a footlocker's. Reaching the same conclusion, the court in *Webb* v. *State*, 373 So. 2d 400 (Fla. Dist. Ct. App. 1979), noted that there are

> arguable differences between the reasonable expectation of privacy one might attach to a paper bag as opposed to a briefcase or luggage of some type. Whereas "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy," *Arkansas* v. *Sanders*, *supra*, the same does not hold true to paper bags.

Id. at 403. Courts have also found the contents of opaque plastic bags, containers comparable to paper bags, to be entitled to a lesser expectation of privacy than personal luggage. *See United States* v. *Ficklin*, Nos. 77-2923 & 77-3320 (9th Cir. Feb. 10, 1978) (memorandum), *cert. denied*, 439 U.S. 825 (1978), *quoted in United States* v. *Stevie*, 582 F.2d 1175, 1179 n.4 (8th Cir. 1978), *cert. denied*, 99 S. Ct.

3102 (1979); *Flynn* v. *State*, 374 So. 2d 1041 (Fla. Dist. Ct. App. 1979) (contrasting *Sanders*).

Recitation of precedent does not by itself determine whether Ross continued to have a reasonable expectation of privacy after his paper bag was lawfully seized by police. We must also rely on our own analysis of when a legitimate expectation of privacy attaches to a given container, so that absent exigent circumstances, a search requires a warrant. As the Supreme Court declared in *Rakas* v. *Illinois*, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary rule issues in criminal cases." 439 U.S. at 143 n.12. Instead, "[l]egitimation of expectation of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Id.* *See Smith* v. *Maryland*, 442 U.S. 735 (1979) (society not prepared to recognize expectation of privacy in identity of telephone numbers called from another telephone). We therefore must decide what "sense of security" should exist in society, and we must do so at least in part by looking at "the customs and values of the past and present . . . ." *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), *quoted in* W. LAFAVE, SEARCH AND SEIZURE § 2.1, at 231 (1978). Other important considerations include the precautions taken to preserve privacy, the manner in which the paper bag was used, and the property rights in the bag at the time of the search. *See* pp. 6-7 *supra*. *See also* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U.L. Rev.

968, 983-84 (1968) ("The degree of privacy offered by structural characteristics such as partitions or walls, is an important determinant of an area's character.").

If a paper bag were a form of luggage, our task would be a simple one: *Sanders* requires a warrant before searching any piece of luggage. Paper bags differ from personal luggage in two material respects, however. First, paper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands. *Cf. United States* v. *Neumann*, 585 F.2d 355 (8th Cir. 1978) (cardboard boxes not secure; inventory search justified).

Second, paper bags are not *inevitably* associated with the expectation of privacy. *See Arkansas* v. *Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with day-to-day living. Luggage typically functions as a portable closet and chest of drawers; it follows that a person could justifiably maintain a substantially higher ex-

pectation of privacy in his personal luggage than in a paper bag.[5]

We therefore must decide whether, under the circumstances of this case, Ross had a reasonable expectation of privacy in the paper bag that the police discovered during the lawful search of the trunk of his car. The officers had reason to believe that the trunk was the warehouse for Ross's narcotics sales. Thus it was serving as more than simply a luggage compartment. When the police in searching the trunk came upon a paper bag, there was not indication that it was being used to carry intimate, private items. *See United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979). *See generally United States ex rel. Cunningham* v. *Follette*, 397 F.2d 143, 145 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969); *Walker* v. *United States*, 327 F.2d 597, 600 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 956 (1964).[6] No one disputes

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[5] We do not, as the dissent suggests, create a rule that only luggage is protected by the fourth amendment. Because society always associates luggage with privacy, the fourth amendment must always protect it. This is not an intrinsic characteristic of the luggage but a legal application of society's manifested expectations—an extrinsic quality, so to speak. Because a paper bag is not a piece of luggage, however, we must undertake the more general inquiry of whether under the facts before us this particular container suggests an expectation of privacy. After examining those facts, we have concluded that Ross's paper bag did not connote such an expectation of privacy. Therefore, there was no privacy interest for the fourth amendment to protect.

[6] There was no evidence that Ross employed the paper bag as a substitute for luggage, nor do the facts and circumstances manifest any special expectation of privacy. If, for example, the police had found the paper bag amidst suitcases or other luggage, there would have been a stronger indication that the bag was pressed into service as a repository of personal

that they had the right to seize the bag to prevent the destruction of its contents, that is, the destruction of possible evidence. *See Arkansas* v. *Sanders*, 442 U.S. at 762; *United States* v. *Chadwick*, 433 U.S. 1, 13 (1978). Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure, *see* p. 14 *supra*, and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

In the final analysis, our determination of what "sense of security" should exist in society must be based upon general experience and judgment. The facts in this case lead us to conclude that Ross could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession, which is all that enables one to protect a paper bag's contents from public exposure. If, as the *Sanders* decision suggests, there are containers that the police, after a proper seizure, may open without a search warrant, Ross's bag must be among the best examples. Thus we agree with Professor LaFave that compared to the warrantless search of luggage, "when the [searched] effects are such things as coats and paper bags, the possessory interest and privacy interest are must less distinct, and it is thus far easier to conclude that the [privacy] interest is not protected by the Warrant Clause whenever exigent

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effects. Similarly, if Ross had sealed the paper bag shut, manifesting a special expectation of privacy, the intrusion of a search would have been more than negligible and a search warrant would have been required. In any situation approaching a borderline case, the police would best be cautious, and obtain a proper search warrant before proceeding.

circumstances allow a warrantless intrusion upon the [possessory] interest." 2 W. LAFAVE, SEARCH AND SEIZURE §5.5, at 365 (1978). *Accord, id.* § 5.5 (Supp. 1980) (analysis unaffected by *Sanders*).

V

With respect to Ross's red leather pouch, *Sanders* controls directly. *See* pp. 7, 14 *supra*. As a type of personal luggage, the pouch, in the words of *Sanders* itself, is a "common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, 442 U.S. 753, 762 (1979). Absent a valid warrant or one of the few recognized exceptions, any evidence secured from the leather pouch should be excluded when determining Ross's criminal culpability.

The Government attempts to bring the warrantless search of the leather pouch within the exception for searches incident to a lawful arrest. The attempt fails. Ross does not challenge a police search of his person or of any object associated with his person at the time of his arrest. *See United States* v. *Robinson*, 414 U.S. 218 (1973). When Detective Cassidy seized the pouch and later opened it at police headquarters, it was far from Ross's reach and in the exclusive control of the police. There was no danger Ross might gain access to the pouch and retrieve a weapon or destroy evidence. The police officers had no reason to believe that the pouch contained explosives or any other item that might prove hazardous to themselves or to the public. Ross's arrest cannot excuse a search made a substantial time later and a substantial distance away. *Preston* v. *United States*, 376 U.S. 364, 367 (1964). *See generally United States* v. *Chadwick*, 433 U.S. 1, 15 (1977); *Chimel* v. *California*, 395 U.S. 752, 763-64 (1969).

We hold that none of the "specifically established and well-delineated exceptions," *Katz* v. *United States*, 384 U.S. 347, 357 (1967), to the warrant requirement applied and that the police failed to follow "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment . . . .'" *Osborn* v. *United States*, 385 U.S. 323, 330 (1966) (quoting *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272 (1960) (opinion of Brennan, J.) (equally divided Court)). The currency found in the red leather pouch should have been suppressed as evidence.[7]

VI

Because Ross's conviction rested in part on evidence that the police obtained through an unlawful search, the conviction is reversed and the case remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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[7] The Government's counsel conceded at oral argument that the $3,200 in currency found in the pouch was essential to the Government's charge of narcotics possession with intent to distribute, the only crime Ross was convicted of having committed. We are thus unable to excuse introduction of the evidence as harmless error. *See, e.g.*, United States v. James, 473 F.2d 115 (D.C. Cir. 1972).

BAZELON, *Senior Circuit Judge, concurring in part and dissenting in part*: This case involves the warrantless search of a zippered leather pouch and a closed paper bag seized from the trunk of an automobile. The majority holds that the search of the pouch was unconstitutional. I agree. However, the majority finds a constitutionally significant difference between the pouch and the paper bag. Based upon this "difference," it holds that the warrantless search of the bag was permissible. With all due respect, I think that this view stands the Fourth Amendment on its head, ignores the increased invasion of privacy that a search constitutes over a seizure, and disregards the teaching of the Supreme Court in this area. Fundamental principles of constitutional law require a warrant to justify the search of a paper bag in the circumstances of this case. I dissent from the majority's holding insofar as it upholds the warrantless search of appellant's bag.

I

The Fourth Amendment demands that "normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause." [1] Thus, it has long been clear that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." [2] Each of these exceptions has been "jealously and carefully drawn." [3] Always, "the

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[1] Arkansas v. Sanders, 99 S. Ct. 2586, 2590 (1979) (footnote omitted).

[2] Katz v. United States, 389 U.S. 347, 357 (1967).

[3] Jones v. United States, 357 U.S. 493, 498-99 (1958).

burden is on those seeking the exemption to show the need for it." [4]

In the case at hand, the constitutionally mandated inquiry is whether the government has shown that the search of the bag fell within one of the few specifically established and well-delineated exceptions to the warrant requirement. The government has failed to make such a showing. First, this is not an "automobile exception" case.[5] The Supreme Court has said in the clearest of terms that "the extent to which the Fourth Amendment applies to containers and other parcels depends *not at all* upon whether they are seized from an automobile." [6] Therefore, the determination of the propriety of the search of the paper bag must be made without regard to its location in the automobile trunk.[7] Second, none of the other recognized exceptions to the warrant requirement applies. The officers did not obtain Ross' permission before searching the bag.[8] The government does not claim that exigent circumstances were present to justify the search.[9] The bag was not in an area within Ross'

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[4] United States v. Jeffers, 342 U.S. 48, 51 (1951). *See also* Katz v. United States, 389 U.S. 347, 357 (1967).

[5] *See* Carroll v. United States, 267 U.S. 132 (1925).

[6] Arkansas v. Sanders, 99 S. Ct. 2586, 2493-94 n.13 (1979) (emphasis added).

[7] The majority concedes as much. Majority Opinion at 7 ("In this case, however, we are not dealing with the search of a car but with the search of two containers.").

[8] *See* United States v. Watson, 423 U.S. 411 (1976).

[9] For example, the government does not allege that there was any fear on the part of the officers that the paper bag contained something that posed a danger to them or to others. If a reasonable apprehension of danger were justified, we would have a different case from the one at hand—one where a search might be proper.

control at the time of his arrest.[10] And, the contents of the bag were not in plain view.[11]

Perhaps the majority is attempting to define some new exception to the warrant requirement. If so, however, its opinion does not make clear what the nature of this new exception might be. Moreover, it is settled that any new exception would have to be necessary to accommodate a vital societal interest, and its reach would be limited to just what is required for that accommodation.[12] Neither the court nor the government suggests that, in the circumstances of this case, the warrantless search of the paper bag was necessary to accommodate a societal interest.

It is undisputed that the bag was Ross' personal property, and that it was searched without a warrant. In the absence of a showing that this warrantless search fell within one of the exceptions to the warrant requirement, fundamental principles of constitutional law require the conclusion that the warrantless search of the bag was in violation of the Fourth Amendment.

II

My distinguished brethren give the foregoing exegesis of Fourth Amendment doctrine only a passing nod.[13] They would apparently dispense with these well-settled principles in favor of what can only be considered an entirely novel approach. Instead of re-

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[10] *See* Chimel v. California, 396 U.S. 72 (1969).

[11] *See* Harris v. United States, 390 U.S. 234 (1968).

[12] Mincey v. Arizona, 437 U.S. 385, 393 (1978); United States v. Chadwick, 433 U.S. 1, 15 (1977); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[13] Majority Opinion at 5.

quiring those seeking an exemption from the warrant requirement to show the need for one, the majority would ask the defendant in each case to demonstrate to the court's satisfaction that his personal possessions should be entitled to the protection of the Fourth Amendment.[14]

This inversion of values is accomplished in the following manner. The court begins by acknowledging the fact that "the Supreme Court has stated clearly and emphatically that exceptions to the warrant requirement are rare." [15] Then, it embarks upon an analysis of recent Supreme Court decisions which wrenches those decisions from their context and transmutes them to render the warrant requirement totally irrelevant whenever a court perceives an insufficient privacy interest in a defendant's personal belongings.

Most prominently, the court today construes *Rakas* v. *Illinois* [16] and several other cases to support the proposition that even when the defendant is contesting a search of his own private property, he must demonstrate an independent privacy interest in order to invoke the protection of the Fourth Amendment.[17] However, the cases do not support that proposition. They are all standing cases. In such cases, the party seeking to assert a Fourth Amendment claim must show that his own rights have been abridged.[18] In

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[14] Majority Opinion at 6.

[15] Majority Opinion at 5.

[16] 439 U.S. 128 (1978).

[17] Majority Opinion at 6.

[18] The majority opinion quotes *Rakas* as requiring the defendant to establish that "the disputed search and seizure

each of the cases cited by the majority, a defendant sought to invoke the Fourth Amendment to suppress evidence obtained in a search of property with which he had no apparent relationship. Since *ownership* was not available to provide standing, the Court applied the "expectation-of-privacy" test first enunciated in *Katz* v. *United States* [19] to determine whether some basis independent of ownership existed to provide standing. In so doing, the Court did not cut back upon the traditional capacity of property owners to invoke the Fourth Amendment. Rather, it made clear that the *Katz* "expectation-of-privacy" test operates as an addendum to the traditional test of ownership, and it clarified the scope of the *Katz* test. Thus, for example, the *Rakas* Court said that Fourth Amendment protection may be conferred "*either* by reference to concepts of real or personal property law *or* to understandings [of the legitimtae expectation of privacy] that are recognized and permitted by society." [20]

The language quoted by my colleagues cannot obscure the fact that, whatever else may be true about the scope of the Fourth Amendment, personal prop-

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has infringed an interest of the defendant which the Fourth Amendment was designed to protect." Majority Opinion at 6. The three words "of the defendant" in the Supreme Court's opinion signify that Court's concern with whether the party seeking suppression was asserting an invasion of *his own* property or privacy.

[19] 389 U.S. 347 (1967).

[20] 439 U.S. 128, 143-44 n.12 (1978) (emphasis added). At least four other times in the *Rakas* opinion, the Supreme Court makes the point that the warrant requirement applies *either* where personal property is involved *or* where a generally recognized expectation of privacy exists. *See, e.g.*, 439 U.S. at 134, 136, 142 n.11, 148.

erty is *presumptively* protected against warrantless searches.[21] After all, the Framers drafted the Amendment to safeguard our citizens against unnecessary intrusions by governmental authorities into their personal lives.[22] And the plain language of the Amendment declares that the people will be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Katz* itself teaches that although the Amendment "protects individual privacy against certain kinds of governmental intrusion, . . . its protections go further, and often have nothing to do with privacy at all." [23]

The property interest defines a *core* of Fourth Amendment protection. This is available regardless of actual expectations, and notwithstanding judicial assessments of the adequacy of privacy-creating pre-

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[21] Katz v. United States, 389 U.S. 347, 357 (1967). *Compare* Majority Opinion at 5-6. The majority is apparently uncomfortable with the position it stakes out, for its opinion is internally inconsistent on the question of whether property is presumptively protected. At one point, the opinion pronounces: "Fourth Amendment rights are not intrinsic attributes of a container or any other object." Majority Opinion at 5. At another point, it is said that "[t]he contents of some containers . . . are entitled to an expectation of privacy regardless of their location or the right to possess them." *Id.* at 7. Luggage, the majority concedes, is inevitably protected. *Id.* A warrant is always required before searching a piece of it. *Id.* at 14. Thus, it appears to be an "intrinsic attribute" of some types of containers that they are protected.

[22] Justice Frankfurter suggested that unwarranted searches by British authorities were one of the potent causes of the Revolution. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (dissenting).

[23] Katz v. United States, 389 U.S. 347, 350 (1967). *See also*, Spinelli v. United States, 393 U.S. 410, 412 n.2 (1969); Alderman v. United States, 394 U.S. 165, 176-80 (1969).

cautions. The privacy interest defines an *additional* zone of protection based upon the reasonable expectations of the actor. Most importantly, in either case, the presumption is that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.[24] The majority shifts that presumption by requiring the defendant to demonstrate that the searched property was associated with the expectation of privacy.[25] This confounds the Constitution.

III

Even if the validity of the search of the bag were to be judged solely by the "expectation-of-privacy" test, I would be forced to reject the answer proffered in the majority opinion.

A.

In applying the "expectation-of-privacy" test, the court once again reads recent Supreme Court decisions to effect a dramatic shift in Fourth Amendment analysis. In particular, the inversion of values that characterizes the court's general approach to the Fourth Amendment is recapitulated in its discussion of the "automobile exception" cases, *United States* v. *Chadwick*[26] and *Arkansas* v. *Sanders*.[27] In each of the cases, the defendant sought to suppress evidence the police had obtained by searching a container found in the trunk of an automobile. In *Chadwick*,

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[24] Katz v. United States, 389 U.S. 347, 357 (1967).

[25] Majority Opinion at 6.

[26] 433 U.S. 1 (1976).

[27] 99 S. Ct. 2586 (1979).

the container was a footlocker; in *Sanders*, a suitcase. First in *Chadwick*, and again in *Sanders*, the Court sought to clarify the scope of the "automobile exception" to the warrant requirement. In the clearest of language, it sought to limit that exception: the exception authorizes warrantless searches of automobiles—and nothing more. As the *Sanders* Court put it, "the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." [28] The Court underscored the impropriety of the searches before it by contrasting the expectation of privacy associated with the searched containers with the unique qualities of an automobile: luggage "is inevitably associated with the expectation of privacy." [29] But the majority turns these cases inside out by seizing upon this language and reading it as creating a "luggage rule" rather than as limiting the "automobile exception." Instead of applying *Chadwick* and *Sanders* to render irrelevant the presence of the brown bag in the trunk of Ross' car, the majority construes those cases as mandating an inquiry into whether or not a brown bag is luggage. Under this novel "luggage rule," if a defendant can establish that a container is "luggage," he "merits" the protection of the warrant requirement. If, however, a defendant is unable to establish the container is "luggage," the warrant requirement does not apply. To read *Chadwick* and *Sanders* in this way is to ignore—to subvert—the Court's effort to limit the "automobile exception." And, of course, such a rule turns the presumption of Fourth Amendment protection inside out.

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[28] *Id.* at 2493-94 n.13.

[29] *Id.*

The majority concedes that, were we dealing with a suitcase, the case would fall squarely within the Supreme Court's holding in *Arkansas* v. *Sanders*, and a search warrant would be required.[30] As the *Sanders* Court put it:

> Where—as in the present case—the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. In this way, the constitutional right of suspects to prior judicial review of searches will be fully protected.[31]

Of course, the containers seized by the police in this case were not suitcases. They were a red leather pouch and a closed brown bag. The majority extends the warrant requirement to the red leather pouch with a single dependent clause: "*As a type of personal luggage*, the pouch, in the words of *Sanders*

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[30] Majority Opinion at 7.

[31] 99 S. Ct. at 2594. It may be true that there is little doubt that a warrant would have been issued if sought. But this is irrelevant. As the Court put it in *Chadwick*:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.

433 U.S. at 15-16 (footnote omitted).

itself, is a 'common repository of personal effects, and therefore is inevitably associated with the expectation of privacy.' " [32] No reasons are given to explain why a red leather pouch is "a type of personal luggage." But, whatever its reasons for calling the pouch "luggage," the majority refuses to extend the favor of that word to the closed brown paper bag.

The majority asserts that the *Sanders* Court "left us without detailed guidance concerning just what nonluggage containers require a warrant before being searched." [33] This is wrong. The *Sanders* Court provided guidance with the following language:

> Not all *containers* and *packages* found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some *containers* (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[34]

In short, the containers or parcels that do *not* deserve the full protection of the Fourth Amendment are

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[32] Majority Opinion at 17 (emphasis added).

[33] Majority Opinion at 9.

[34] 99 S. Ct. at 2593-94 n.13 (emphasis added). We note specifically that the *Sanders* Court used the words "containers" and "parcels" and not the more restrictive word "luggage" to describe the class of items protected by the Warrant Clause. This is a clear indication that the Court viewed more than luggage—indeed that it viewed, as it said, even "parcels"—as protected by that Clause.

those that display their contents by their nature. Clearly, the closed brown paper bag was not a container whose "contents can be inferred from [its] outward appearance." And its contents were not in plain view. Therefore, it did not fall within the exceptions to the warrant requirement expressly articulated by the *Sanders* Court.

Of course, the exceptions expressly articulated by the Court may not exhaust the list of possible exceptions. But given the presumption against exceptions to the warrant requirement, the paper bag must be considered a "container" or "parcel" to which full Fourth Amendment protections apply in the absence of some indication to the contrary. In holding otherwise, the majority makes the level of constitutional protection available to a citizen dependent on his ability to purchase a fancy repository for his belongings. This is an unacceptable standard. When a citizen takes the trouble to close a bag over his belongings, he manifests a privacy interest that deserves protection. The fact that the repository of personal effects is less expensive than a piece of luggage is of no import.

B.

To an extent, the majority's application of the "expectation-of-privacy" test proceeds independent of its novel "luggage rule." The paper bag is singled out for lesser protection by asserting that "a lower expectation of privacy may be justified when [a] defendant no longer possesses the searched item." [16]

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[16] Majority Opinion at 7. This provides an interesting postscript to the argument just analyzed. Significantly, the majority does not claim that a suitcase, once seized, loses the expectation of privacy associated with it. Nor does it claim

Applying this assumption here, the focus of the majority's inquiry becomes "whether Ross reasonably could expect that *after the bag* [was] seized by the police [it] nevertheless would remain unopened." [36] In the majority's view, he could not—and, thus, the fact of seizure is used to discount Ross' privacy interest in his private property.[37] This is painfully obvious bootstrapping. It is unsupported by precedent,[38] and it is contrary to the teachings of the Supreme Court.

Once again, *Sanders* and *Chadwick* are relevant. In *Sanders*, the Court took pains to note that the

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that a red leather pouch, once seized, is less protected. Somehow, the "diminished expectation of privacy" that follows a seizure is reserved for paper bags.

[36] Majority Opinion at 8 (emphasis added).

[37] The majority feels constrained to justify the *seizure* of the paper bag by reference to the automobile exception to the warrant requirement. Majority Opinion at 8. Since, by hypothesis, the majority views the Fourth Amendment and the "reasonable expectation of privacy" as co-extensive, this means that the majority concedes that there was an expectation of privacy about the bag *prior to* its seizure by the police. It is therefore incumbent upon the majority to demonstrate that the fact of seizure somehow dissipates the privacy interest appellant Ross had in the bag.

[38] The majority cites only Rakas v. Illinois as support for its position. Majority Opinion at 7. But the passage in *Rakas*, which appears in the dissent, says only that *"perhaps* the Constitution provides some degree less protection" when the defendant has *no* possessory interest in a *place* that is the subject of a search. Rakas v. Illinois, 439 U.S. 128, 166 (1978). In the case at hand, Ross maintained *some* possessory interest in the paper bag—even after it was seized. And, of course, we are dealing with Ross's *private property*, not a *place* owned by some third party.

expectations of privacy that attends a container is not diminished "merely because [it] is to be carried in an automobile rather than transported by other means or temporarily checked or stored." [39] My brethren circumvent the rule of *Sanders* by inserting an extra step. The automobile exception is used to justify the seizure of the paper bag. Then, the seizure is used to reduce the expectation of privacy attending the paper bag, and thereby to justify the search. Through this legerdemain, the automobile is used to diminish the expectation of privacy associated with the paper bag—precisely the result forbidden by *Sanders*.

In *Chadwick* and again in *Sanders*, the Supreme Court examined the propriety of searches of containers that had been lawfully seized. Both times, the Court made the point that precisely because the containers had been seized—had been immobilized—a warrantless search was unnecessary and impermissible.[40] The police had control of the containers, the Court said, so there was no danger of anything untoward happening to the evidence while they waited to get a warrant. Moreover, a search involves a far greater intrusion into Fourth Amendment values than does impoundment. Thus, "the principle of lesser intrusion" would "mandate obtaining judicial permission before effectuation of the more intrusive search." [41] I respectfully submit that the court today ignores this clear teaching of the Supreme Court.

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[39] 99 S. Ct. 2586, 2593 (1979).

[40] 99 S. St. at 2592-94; 433 U.S. at 13-16.

[41] United States v. Chadwick *And the Lesser Intrusion Concept: The Unreasonableness Of Being Reasonable*, 58 B.U. L. REV. 436, 466-67 (1978).

The seizure of the paper bag does not justify a warrantless search—on the contrary, it forbids it.[42]

C.

The court's conclusion that Ross did not have a reasonable expectation of privacy in the contents of the bag once it was in police hands is, at bottom, based upon the unadorned notion that in the very nature of things: "It just *can't be* that a brown paper bag has an expectation of privacy about it!"

We are told first, that a paper bag offers "at best only minimal protection against accidental and deliberate intrusion;" it "can fall open or break very easily;" it can easily be invaded by the "curious or dishonest;" in short, a paper bag is "neither so secure nor so permanent as typical forms of luggage." [43] The majority finds this putative distinction constitutionally significant. But surely, the applicability of the warrant requirement cannot turn on whether a person carries his belongings in a frayed cloth suitcase or new American Tourister. Is the court saying that if Ross had used two or three paper bags inside one another, thereby rendering the contents more secure, the police would have been required to obtain a warrant prior to the search? The majority does concede that if Ross had taped the paper bag shut, a warrant would have been required.[44] Does this mean there is a constitutionally significant difference be-

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[42] The rule proposed by the majority would have the undesirable effect of encouraging seizures that might not otherwise occur, because the seizures would serve as the basis for otherwise impermissible searches.

[43] Majority Opinion at 14.

[44] Majority Opinion at 15-16 n.6.

tween taping a bag shut and closing it by folding it over? And, how is a taped bag any less fragile than an untaped one?

We are told, second, that the majority does "not believe a reasonable man would identify paper bags as a normal place to entrust his intimate personal belongings." [45] Can such speculation about what a "reasonable man" thinks about paper bags be attributable to anything but "acute ethnocentric myopia?" [46] The simple fact is that in some of our subcultures paper bags are often used to carry intimate personal belongings. And, the sight of some of our less fortunate citizens carrying their belongings in brown paper bags is too familiar to permit such class biases to diminish protection of privacy. Moreover, there is no constitutional basis for saying that only repositories of "*intimate* personal belongings" [47] implicate privacy interests.

At bottom, the reason the majority refuses to extend the warrant requirement to the paper bag is its determination that in society's "general experience and judgment," the use of a bag does not provide its owner "a sense of security." [48] There can be no doubt that the *general* experience is that a great many people would see a paper bag as implicating privacy. It seems to me unduly presumptuous—and dangerous

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[45] Majority Opinion at 14.

[46] FCC v. Pacifica Foundation, 438 U.S. 726, 775 (1979) (Brennan, J., dissenting) (Majority approved an FCC ruling "channelling" the use of certain words to certain broadcast times; Justice Brennan noted that the proscribed words were the coin of expression in some of our subcultures).

[47] Majority Opinion at 14.

[48] Majority Opinion at 16.

—to proffer a single understanding of the privacy associated by different kinds of people with different kinds of containers.

I reach a result different from the majority based not only upon my different understanding of "general experience and judgment," but also upon constitutional analysis. First, the constitution does not limit the protection of the warrant requirement to those items of personal property which "general experience and judgment" dictate require protection. The Fourth Amendment applies to all items of personal property.[49] Second, there is a strong presumption against *any* warrantless search of personal property.[50] And, third, under the standard enunciated by the Supreme Court in *Arkansas* v. *Sanders*, the containers involved in this case merit the protection of the warrant requirement. This is so even if the majority is correct in assuming that the existence *vel non* of Fourth Amendment protection turns on a linguistic analysis of the word "luggage" and its variations.

IV

While conceding that "recitation of precedent does not by itself determine whether Ross [had] a reasonable expectation of privacy," [51] the majority compiles an extensive list of cases tangentially related to the case at hand. The vast majority of the cases cited are clearly irrelevant. Most deal with containers which, even on the restrictive standard proposed in today's majority opinion, "merit" the protection of the warrant requirement. And many predate the

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[49] *See* Part II *supra*.

[50] *See* Part I *supra*.

[51] Majority Opinion at 13.

Supreme Court's decision in *Arkansas* v. *Sanders*, a decision which did much to clarify the law in this area.

More important, the case law the majority cites to support the conclusion that a paper bag is not protected against a warrantless search, in fact, supports the opposite conclusion.[52] For example, in *People* v. *Marshall*, the California Supreme Court invalidated the warrantless search of a paper bag. Chief Justice Traynor wrote:

> The fact that the container was only a brown paper bag instead of a packing box, purse, handbag, briefcase, hatbox, snuffbox, trunk, desk or chest of drawers . . . is immaterial. It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant.[53]

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[52] Of the four cases cited by the majority involving paper bags, Majority Opinion at 12-13 and 12 n.4(9), two predated *Sanders*, United States v. Vento, 533 F.2d 838 (3d Cir. 1976); Clark v. United States, 574 P.2d 1261 (Alas. 1978), and the other two treated the propriety of the search of the paper bag only in *dictum*, United States v. Andrews, No. 78 Cr. 374 (MJL) (S.D.N.Y. No. 2, 1979); Webb v. State, 373 So.2d 400 (Fla. Dist. Ct. App. 1979). Indeed, one of the two cases that predated *Sanders*, Clark v. State was later limited by that court. State of Alaska v. Daniel, 589 P.2d 408 (Alaska 1979). *Daniel* explained that the search of the paper bag at issue in *Clark* was permitted because of exigent circumstances (the danger that the evidence would be destroyed). The *Daniel* court made clear that the *Clark* case was not decided on the issue of expectation of privacy.

[53] 442 P.2d 665, 669 (1968).

The Seventh Circuit has refused to approve the warrantless search of an "open" brown paper sack, the contents of which were not in the "plain view" of the officer before he seized the bag.[54] Other courts have reached similar results.[55] And, in *United States* v. *Dien*,[56] a unanimous panel of the Second Circuit disallowed the warrantless search of three large cardboard boxes; the court found the Supreme Court's decision in *Arkansas* v. *Sanders* controlling.[57]

Finally, two recent cases in our own Circuit bear mention. In *United States* v. *Battle*,[58] the defendant challenged the warrantless search of a shopping bag he was carrying at the time of his arrest. The shopping bag was not searched until the defendant was at police headquarters. The court approved the search

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[54] United States v. Griffith, 537 F.2d 900 (7th Cir. 1976).

[55] *See, e.g.*, North Carolina v. Francum (No. 7825 SC 773, C.A.N.C., January 16, 1979) (paper bag); State v. Brown, 557 P.2d 1052 (Sup. Ct. Arizona, 1976) (paper bag). *See also*, Liles v. State of Florida, 375 S. 2d 1094 (D.C. App. Fla. 1979 (vinyl satchel; People v. Boyles, 395 N.E. 2d 663 (Ill. App. Ct., 1979) (cloth drawstring bag).

[56] No. 79-1036 (2d Cir. Oct. 26, 1979).

[57] *Id.*, Slip Op. at 5245. The majority attempts to distinguish *Dien* on two grounds. Majority Opinion at 11 n.3. First, it asserts that the defendants in *Dien* manifested an expectation of privacy by secreting the boxes inside their van. But Ross had secreted his paper bag in his trunk. This leaves only the fact that the defendants in *Dien* had used plastic tape to seal the boxes to distinguish *Dien* from the case at hand. But this is not a rational ground for distinction. *See* Part III *supra* (discussing the significance of taping a paper bag). Additionally, it is quite possible that taping the boxes in *Dien* was necessary to accomplish the closing of the boxes. Ross had closed the bag by folding it over.

[58] 510 F.2d 776 (D.C.Cir. 1975) (Tamm, J.).

as incident to a lawful arrest because, under the rule of *Draper* v. *United States*,[59] a container which is within the immediate control of the defendant at the time of his arrest may be searched incident to his arrest even if the search is not contemporaneous with the arrest. Of course, no one contends that the *Draper* exception, which applies to all containers (suitcases as well as bags), governs the case before us. The paper bag was not in Ross' immediate control at the time of his arrest. To that extent, *Battle* is irrelevant. But, it is significant that the *Battle* court felt constrained to find an exception to the warrant requirement—the "search-incident-to-arrest" exception—sufficient to justify the search. By implication, therefore, the *Battle* court felt that the warrant requirement applied to the paper bag that was searched.

United States v. *Brown*[60] presented a situation where, as the arresting officers approached the defendant, he shoved or threw a small paper bag into a bush beside him. A search of the bag revealed narcotics. The defendant challenged the warrantless search as illegal. In discussing the merits of the defendant's claim, the majority and the dissent struggled with the question of whether the defendant had abandoned the paper bag—thus permitting a warrantless search. Neither the majority nor the dissent doubted that the Fourth Amendment extended to the paper bag.

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[59] 358 U.S. 307, 314 (1959).

[60] Nos. 77-2106 and 77-1646 (D.C. Cir. March 21, 1980).

CONCLUSION

The fatal flaw in the majority opinion is that, in examining the applicability of the Fourth Amendment to the search of the paper bag, it shifts the burden of demonstration from those seeking to justify the search to those seeking the protection of the warrant requirement. This unfortunately constitutionalizes a distinction between a red leather pouch and a paper bag that is necessarily based at least in some part on economic and class differences and perceptions.

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No. 80-2209

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This supplemental memorandum, filed pursuant to Rule 22.6 of the Rules of this Court, is submitted to direct the Court's attention to the recent decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Mefford*, No. 81-1104 (Sept. 8, 1981). Like *Government of the Virgin Islands* v. *Rasool*, No. 81-1267 (3d Cir. Aug. 19, 1981), noted in our reply memorandum (at 5 note 3), *Mefford* upholds the warrantless search of an unsealed paper bag, distinguishing *Robbins* v. *California*, No. 80-148 (July 1, 1981). The analysis and result in *Mefford*, like the Third Circuit's in *Rasool*, conflict with the court of appeals'

decision in the instant case.[1] The recent decision by the Eighth Circuit underscores the absence of definitive guidance for resolution of the question presented in our petition and accordingly demonstrates the need for consideration of that question by this Court.[2]

For the foregoing reasons and the reasons stated in the petition and our reply memorandum, the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[1]As in the Third Circuit case, the Eighth Circuit relied in part (slip op. 7-11) on *New York* v. *Belton*, No. 80-328 (July 1, 1981), but stated in addition that the defendant, Mefford, "did not have a sufficient expectation of privacy to invoke [*United States* v.] *Chadwick* [, 433 U.S. 1 (1977)] protection" for the contents of his unsealed paper bag (*United States* v. *Mefford*, *supra*, slip op. 9).

[2]We also call the Court's attention to *Sharpe* v. *United States*, Nos. 79-5314 & 79-5315 (4th Cir. Sept. 4, 1981), in which a divided panel held that a warrant was required to search burlap bags believed to contain marijuana. The conflicting opinions of the majority and the dissent in that case further illustrate the uncertainty that the issue presented in our petition in the instant case continues to generate in the lower courts.

DOJ-1981-09

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
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SUPREME COURT, U.S.

No. 80-2209

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Albert Ross, Jr., by and through his counsel, moves the Court for leave to proceed in forma pauperis in this Court, and as reasons therefore, states:

That said Respondent was granted leave to proceed on appeal in forma pauperis in the United States Court of Appeals for the District of Columbia Circuit, in this case, and that counsel was appointed for Respondent as evidenced by the Order of the Circuit Court which is attached hereto and prayed to be considered as a part hereof.

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Counsel for Respondent

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1624 September Term, 19 78

United States of America CR No. 78-698

v.

Albert Ross, Jr.,
Appellant

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 25 1979
GEORGE A. FISHER
CLERK

BEFORE: Wright, Chief Judge

O R D E R

It appearing that appellant has been granted leave by the District Court to proceed herein in forma pauperis, it is

ORDERED that: William Garber, Esquire (TRC)
406 5th Street, NW
Washington, D.C. 20001
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a member of the Bar of this Court is appointed to represent appellant in this case.

Appellant's time for filing his brief is extended for a period of 40 days from the date of this order.

In the event counsel files a motion in this Court to extend time for filing appellant's brief and said motion is based in whole or in part upon the fact that counsel is awaiting preparation of reporter's transcript, he shall include in his motion a statement indicating the date when the transcript was ordered prepared; the name of the court reporter(s); the reason why the court reporter has not completed the transcript; and the date by which the court reporter expects to complete the transcript.

For The Court:

GEORGE A. FISHER, Clerk

By: Daniel M. Cathey
First Deputy Clerk

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ALBERT ROSS, JR.

MEMORANDUM FOR ALBERT ROSS, JR., RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. GARBER
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IN THE
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ALBERT ROSS, JR.

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MEMORANDUM FOR ALBERT ROSS, JR., RESPONDENT
IN OPPOSITION

Petitioner contends that a warrantless search, based upon probable cause, of a closed but unsealed paper bag, found in the trunk of respondent's automobile, was permissible under the Fourth Amendment.

The facts in the case were set forth in the two opinions of the Court of Appeals. (Pet. App. 4a-6a; 121a-122a).

On November 27, 1978, Detective Charles Marcum of the Metropolitan Police Department, Washington, D.C. received a telephone call from an informant, whom the Court found to have been reliable in the past, that an individual known as "Bandit" was selling narcotics in front of a certain address in Northwest Washington, D.C. A description was given of "Bandit" and the vehicle and that the drugs were in the trunk of the vehicle.

Detective Marcum along with two other Detectives, went to the area, saw the vehicle at the location, but parked and unoccupied. After passing through the area twice, the police saw the vehicle being driven by respondent. Respondent was stopped, asked to exit the vehicle. A round of ammunition was

found on the front seat. A search of the interior of the vehicle revealed a gun in the glove compartment. Respondent was arrested and handcuffed. The trunk of his vehicle was unlocked by a Detective Cassidy and found inside was a red leather pouch and a closed but unsealed "lunch type bag." Cassidy opened the bag at the scene and observed glassine envelops containing a white powder. The bag was left in the trunk and the vehicle was driven to police headquarters where the paper bag was seized, along with the red leather pouch. The paper bag contained some thirty glassine envelops of powder, which laboratory analysis later proved to be heroin. The pouch contained some $3,200.00 in U.S. Currency.

Respondent was indicted by a federal Grand Jury on certain charges including possession with intent to distribute a contolled substance (21 USC 841a). A motion to suppress evidence was made and denied after hearing by the District Judge. Respondent was convicted of the possession with intent to distribute charge. On appeal, the original panel reversed the conviction, holding that the search of the leather pouch without a warrant, violated respondent's Fourth Amendment rights. A majority of the panel ruled that the warrantless search involving the paper bag did not violate Fourth Amendment rights.

Acting upon respondent's suggestion, the en banc Court, held that the search of the paper bag without a warrant, also violated Fourth Amendment rights. This was the view of seven members of the en banc panel.

The United States of America has petitioned this Court for a Writ of Certiorari challenging the correctness of the Circuit Court's ruling on the search of the paper bag. The United States does not raise the issue concerning the leather pouch as respondent views their petition.

ARGUMENT

Respondent contends that the opinion by the seven member majority of the en banc panel of the Circuit Court correctly applied the law as to the search of the paper bag.

Following the filing of the Petition by the United States, this Court issued its opinions in Robbins v. California, No. 80-148, July 1, 1981 and New York v. Belton, No. 80-328, also decided July 1, 1981. Reference is made to the Robbins plurality.

The plurality opinion reaffirms the principle that the Fourth Amendment "protects people and their effects, and it protects those effects whether they are 'personal' or impersonal.'"

Following the opinion in Robbins, supra respondent contends that the placing of a closed paper bag in the locked trunk of a vehicle "manifested an expectation that the contents would remain free from public examination." citing United States v. Chadwick, 433 U.S. 1, 11.

Under the facts of the instant case, the respondent was in custody following the discovery of a gun in the glove compartment of the vehicle. The trunk of the vehicle was locked and was opened by one of the arresting officers. The paper bag was closed and there appeared to be nothing about the outward appearance of the bag to reveal the nature of its contents. (Pet. A. 25a-26a). The officer only looked into the paper bag, but did not examine the contents of the pouch at the scene of the arrest. Neither item was removed from the trunk and it was not until the vehicle had been taken to police headquarters were both the paper bag and pouch seized from the trunk and the contents searched.

Respondent submits that the Circuit Court, en banc, carefully considered the entire record in this case and concluded that under the facts of this case, the search of the paper bag violated respondent's Fourth Amendment rights. Respondent submits that the en banc majority not only correctly interpreted

Arkansas v. Sanders, 442 U.S. 753 and United States v. Chadwick, supra, but that its opinion adheres to this Court's subsequent opinion in Robbins, supra, and, in fact, the plurality opinion makes reference to United States v. Ross, F.2d ; when it comments. "What one person may put into a suitcase, another may put into a paper bag."

The fact common to Chadwick, Sanders and Robbins, was that each of the containers did not by the appearance of each reveal the nature of its contents and each indicated that the owner manifested an expectation of privacy. The instant case is an example of items contained in a closed opaque container in a location where an expectation of privacy was manifested.

Respondent submits that this Court in its decisions in Chadwick, Sanders and Robbins, has given sufficient guidelines to the lower Courts in the areas of searches and seizures of closed containers found within automobiles. This Court in New York v. Belton, supra has differentiated between searches in the passenger compartment of a vehicle of an arrested occupant and searches conducted under the Chadwick-Sanders rationale. Although the decision in the instant case post-dated Chadwick and Sanders, but pre-dated Robbins, its decision comports with each of the three decisions.

Each case in the area of the Fourth Amendment must be determined ultimately upon its own facts. Respondent submits that the Circuit Courts now have sufficient guidance from this Court in the area in question without this Court being burdened with deciding whether various containers located in the trunk areas of vehicles were properly searched without a warrant on a case by case basis.

Respondent contends that the instant case was properly decided and that it matters not whether the paper bag was merely closed as opposed to being taped shut.

Respondent contends that the Circuit Court's en banc majority opinion correctly concluded that Sanders, supra "did not establish a ' worthy container' rule" (Pet. App. 3a). Moreover, respondent contends that the Circuit Court's en banc majority correctly observed ". . .that a rule under which the validity of a warrantless search would turn on judgments about the durability of a container would impose an unreasonable and unmanageable burden on police and courts. . ." (Pet. A. 4a).

The Circuit Court's en banc majority correctly recognized this Court's stress on 'the centrality of the warrant requirement to Fourth Amendment enforcement.' (Pet. A. 25a). It also recognized the distinction between containers which indicated the nature of their contents and the 'plain view' doctrine and containers which are opaque and which do not reveal what is contained inside. (Pet. A. 25a).

The Circuit Court's en banc majority correctly concluded that ". . .'(w)here-as in the present case- the police without endangering themselves or risking loss of the evidence,' lawfully have stopped a car, detained any person in it suspected of criminal activity, and secured parcels found in the car, they must delay search of the parcels 'until after judicial approval has been obtained. In this way, constitutional rights of suspects to prior judicial review of searches will be fully protected.' Sanders, 442 U.S. at 766." (Pet. A. 27a).

Respondent contends that the above quotations from the Circiut Court's en banc majority opinion are entirely consistent with the rationale of the plurality opinion in Robbins, supra, in this connection.

Respondent is fully cognizant of Mr. Justice Powell's concern in what he characterized as a "new 'bright line' rule." However, he concurred in the judgment because of the manner in which the package in question was wrapped and sealed. He further recognized that the central purpose of the Fourth Amendment was "to safeguard reasonable expectations of privacy."

Respondent contends that it is not without significance that the paper bag in question was closed and stored in the locked trunk of the vehicle as opposed to another area of the vehicle more accessible to the public eye and intrusion.

Respondent submits that there is a greater expectation of privacy in the trunk of an automobile than in the interior of the car. United States v. Wilson, 636 F.2d 1161 (10, 1980).

We think that this distinction is implicit in this Court's decision in New York v. Belton, supra.

CONCLUSION

Respondent submits that in view of the exhaustive and careful treatment that this case was given by the Circuit Court's en banc majority and its judicious adherence to the Chadwick-Sanders rationale and the fact that this Court has given greater clarification of the issue in Robbins v. California, supra, the Petition of the United States of America for a Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
SEP 1 1981
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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

The question presented by the government's petition in the instant case is whether police, acting with probable cause but without a warrant, properly searched a closed but unsealed paper bag found in the trunk of respondent's automobile during a lawful search of the vehicle. In opposition to the petition, respondent contends (Mem. in Opp. 3-6) that this Court's subsequent decision in *Robbins* v. *California*, No. 80-148 (July 1, 1981), which addressed the opening by police of a sealed opaque plastic wrapped package containing marijuana bricks during a vehicle search, makes review of this question unnecessary. In our view, however, the failure of the Court in *Robbins* to articulate the principles governing the search of such packages during lawful automobile searches in any fashion that commanded a majority of the Court leaves this important area of Fourth

Amendment law unsettled. The reasons for granting review in this case are, accordingly, even more substantial than they were prior to the decision in *Robbins*.

In *Robbins*, the plurality opinion authored by Justice Stewart, in which Justices Brennan, White, and Marshall joined, adopted an absolute standard governing searches of closed containers during lawful automobile searches, rejecting the argument that, for purposes of the Fourth Amendment warrant clause, there is a distinction between luggage and other traditional repositories for personal effects, on the one hand, and flimsier containers such as paper bags in which there is typically a less substantial privacy expectation, on the other. Slip op. 5. The plurality also concluded that, in the absence of some other recognized exception to the warrant requirement, "a [closed opaque] container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile" (*id.* at 8).

Two Justices concurred only in the judgment reversing Robbins' conviction. Justice Powell stated (*Robbins, supra*, slip op. 1) that he concurred in the judgment because the result was "justified, though not compelled, by the Court's opinion in *Arkansas* v. *Sanders*, 442 U.S. 756 (1979)," but that he could not join the plurality opinion because it went well beyond *Sanders* or any prior case. In particular, he rejected the plurality's sweeping requirement that law enforcement officers must procure a warrant prior to the search of any closed container, irrespective of circumstances which demonstrate the absence of any reasonable expectation of privacy respecting its contents (*Robbins, supra*, slip op. 5-6). In Justice Powell's view, which we share (but contrary to the decision of the court of appeals in the instant case), this Court's decisions in *Arkansas* v. *Sanders, supra*, and *United States* v. *Chadwick*, 433 U.S. 1 (1977), "require police to obtain a warrant to search the contents of a container only when the container is one that generally

serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny" (*id.* at 4). This formulation requires a determination whether the defendant's claim to privacy in a particular type of container "is reasonable in light of all the surrounding circumstances." *Id.* at 5, quoting *Rakas* v. *Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring). Noting that some packages, such as paper grocery bags, "consistently lack" indicia of an expectation of privacy, and that otherwise ambiguous containers may evidence the extent of their owner's privacy expectations by virtue of their size, shape, construction, or sealing, Justice Powell concluded in *Robbins* that, because of "the manner in which the package at issue was carefully wrapped and sealed," it fell within the protected category (slip op. 1, 6 n.3).

Justice Powell also questioned the plurality's conclusion that it was of no consequence that the sealed package was opened during the course of a lawful automobile search. He found substantial merit in the position of the three dissenters[1] that "when the police have probable cause to search an automobile, rather than only to search a particular container that is fortuitously located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein" (*Robbins, supra,* slip op. 7), and observed that adoption of such an approach would "provide ground for agreement by a majority of the presently fractured

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[1]In his dissent, Justice Blackmun adhered to his view, expressed in *Arkansas* v. *Sanders, supra,* 442 U.S. at 772 (Blackmun, J., dissenting), that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant. Slip op. 1-2 (Blackmun, J., dissenting). Both Justice Rehnquist (slip op. 5, 7) and Justice Stevens (slip op. 1-4) endorsed that analysis in their respective dissents, as well.

Court on an approach that would give more specific guidance to police and courts in this recurring situation * * *" (*ibid.*). Justice Powell declined, however, to undertake a reexamination in *Robbins* of broad language in *Sanders* deemed inconsistent with this application of the automobile search exception because the argument was not pressed by the parties and it was too "late in the Term * * * to undertake *sua sponte* reconsideration of basic doctrines" (*Robbins, supra,* slip op. 7). He concluded by observing that the Court has "an institutional responsibility * * * to make every reasonable effort to harmonize [its] views on constitutional questions of broad practical application," and that "the confusion that infects this benighted area of the law" could be resolved only in the context of a future case implicating the principles in question. *Id.* at 8 & n.4.[2]

Because the instant case involves the opening by police officers of an unsealed paper bag during the warrantless search of an automobile for heroin, it provides precisely the vehicle envisioned by Justice Powell for resolving the issues that divided the *Robbins* Court. In view of the importance for law enforcement of the issues involved—whether application of the warrant requirement depends upon the character of the container that is the object of the search, and whether, during a lawful, warrantless automobile search, the police may open containers found there—we renew our

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[2]The Chief Justice also concurred in the judgment but wrote no opinion setting forth his reasoning. But cf. *Arkansas* v. *Sanders, supra,* 442 U.S. at 766-768 (Burger, C.J., concurring), wherein the Chief Justice observed that the warrantless luggage searches in *Chadwick* and *Sanders* were not conducted in connection with automobile searches, and suggested that the rule regarding warrants for luggage searches might differ when the search was incidental to an automobile search.

submission that review should be granted to clarify the principles that govern this area of the Fourth Amendment law.[3]

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[3]The absence of authoritative guidance left in the wake of *Robbins* has already been noted by at least one court of appeals. *Government of the Virgin Islands* v. *Rasool, Abiff Hiram*, No. 81-1267 (3d Cir. Aug. 19, 1981), slip op. 20-22; *id.* at 25-27 (Adams, J., concurring). Although deciding the case in reliance upon *New York* v. *Belton*, No. 80-328 (July 1, 1981), the Third Circuit squarely stated as well that, notwithstanding *Robbins*, it would have upheld the warrantless search of a paper bag found in an automobile on the ground expressed in Judge Tamm's dissent in the instant case--*i.e.*, that the container involved could not support an expectation of privacy sufficient to require a warrant. *Rasool, supra*, slip op. 22; see Pet. App. 28a-47a. Only further review of this question by this Court can eliminate the sharp division among the courts of appeals on the question presented in our petition.

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QUESTION PRESENTED

Whether a warrantless search, based upon probable cause, of a closed but unsealed paper bag found in the trunk of respondent's automobile during a lawful search of the automobile was permissible under the Fourth Amendment.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-117a) is reported at 655 F.2d 1159. The opinion of the court of appeals panel (Pet. App. 120a-158a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 118a-119a) was entered on March 31, 1981. On May 21, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 1981. The petition was filed on that date and granted on October 13, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, respondent was convicted on one count of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a). He was sentenced to a term of from 20 months to five years' imprisonment, followed by a six-year special parole term. Both the panel and the en banc court of appeals reversed the conviction.

1. As reflected in the opinion of the en banc court (Pet. App. 4a-6a), evidence developed during a suppression hearing showed that on November 27, 1978, a District of Columbia police detective was told by a reliable informant that he had observed a man known as "Bandit" selling narcotics from the trunk of a maroon two-door Chevrolet Malibu automobile (H. Tr. 4).[1] Upon arriving at the address specified by the informant, the detective, accompanied by two other police officers, observed a vehicle being driven by respondent that matched the informant's description. The officers ascertained that it was registered to respondent, who, they learned, bore the nickname "Bandit" (H. Tr. 5). They then stopped the vehicle, identified themselves, and asked respondent to step out. While one of the officers searched respondent, a second police officer spotted a round of ammunition on the front seat of the car. The officer retrieved the ammunition and searched the interior of the vehicle for weapons, finding a pistol in the glove compartment (H. Tr. 8-10, 49).

After respondent was arrested, the third officer unlocked and searched the vehicle's trunk (H. Tr. 59, 66). The search was conducted because the information re-

[1] "H. Tr." denotes the transcript of the suppression hearing.

ceived from the informant indicated that "there was a quantity of heroin secreted in the trunk of the car" (*id.* at 66). In the trunk, the officer discovered a brown paper lunch bag with a folded but unsealed top and a zippered leather pouch. He opened the paper bag and discovered in it a number of glassine envelopes each containing a white powder. Leaving the paper bag and the leather pouch in the trunk, the officers drove respondent's automobile to the police station. At the station, the officers reopened the paper bag and sent the glassine envelopes to the police laboratory for analysis. Each proved to contain a quantity of heroin. One of the officers then opened the leather pouch as well, and found that it contained $3,200 in currency (H. Tr. 66, 67, 82). No search warrant had been obtained at any point in this sequence of events. On the basis of this evidence, adduced at the suppression hearing, the trial judge denied respondent's motion to suppress the contents of the paper bag and the leather pouch. Respondent was convicted after trial and appealed from his conviction. Pet. App. 123a.

2. On appeal, a panel of the court of appeals reversed respondent's conviction. The members of the panel agreed that, because the police lacked a search warrant, the search of the zippered leather pouch was unlawful, and the currency that was discovered in the pouch should have been suppressed (Pet. App. 137a-138a, 139a). However, a majority of the panel held (*id.* at 124a-137a) that the warrantless probable cause search of the paper bag was permissible because respondent "could not reasonably harbor an expectation of privacy in his paper bag beyond that existing due to actual possession" (*id.* at 136a). Concluding that admission into evidence of the currency found in the pouch was not harmless error (*id.* at 138a n.7), the panel remanded for further proceedings consistent with the opinion.

In distinguishing respondent's paper bag from the leather pouch and other kinds of substantial and secure containers in the nature of luggage, the panel majority relied upon this Court's statement in *Arkansas* v. *Sanders*,

442 U.S. 753, 764 n.13 (1979), that although a warrant is generally required to search luggage seized from a vehicle, absent consent, exigent circumstances, or other recognized predicate for a warrantless search, "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." The panel observed that unsealed paper bags differ from luggage and other common repositories for personal effects in two respects it deemed significant for Fourth Amendment purposes. First, the panel noted the physical and functional attributes of such a container (Pet. App. 134a):

> [P]aper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

Second, the panel noted that the conventional uses of paper bags do not include those which require a high degree of privacy, concluding that society recognizes only a limited expectation of privacy in such a container (*ibid.*; emphasis in original; footnote omitted):

> [P]aper bags are not *inevitably* associated with the expectation of privacy. See *Arkansas* v. *Sanders*, 442 U.S. 752, 762 (1979). Although a paper bag *may* be pressed into service as a repository of personal effects, we do not believe a reasonable man would identify a paper bag as a normal place to entrust his intimate personal possessions. In contrast, luggage in general serves to carry clothes, toiletries, and other items associated with day-to-

> day living. Luggage typically functions as a portable closet and chest of drawers. It follows that a person could justifiably maintain a substantially higher expectation of privacy in his personal luggage than in a paper bag.

The panel concluded (Pet. App. 136a; emphasis in original):

> Because a paper bag's general vulnerability suggests no reasonable expectation of privacy after its seizure * * * and because the police justifiably believed that *this* paper bag was not being used to store personal items, the police lawfully could open it without violating Ross's fourth amendment rights.

3. Acting upon respondent's suggestion, the court of appeals granted rehearing en banc. In an opinion joined by seven of its members, the majority of the court rejected the panel's conclusion that the warrantless search of the unsealed paper bag was permissible (Pet. App. 1a-27a).[2] Although the majority agreed that respondent's car was properly stopped and searched, and the paper bag and leather pouch properly seized, it held that "no 'special exigencies' justified opening the pouch or the bag without a warrant" and that no other "established, well-drawn exception" to the warrant requirement was applicable (Pet. App. 20a, 21a; footnote omitted).

Preliminarily, the court considered (Pet. App. 16a-19a) whether a distinction could be drawn between the situations in *Arkansas* v. *Sanders*, *supra*, and *United*

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[2] On rehearing en banc the government did not challenge the panel's ruling regarding the warrantless search of the leather pouch on its merits. The government did argue that *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), should not have been applied retroactively to the search in issue, and that, for that reason, none of the evidence should have been suppressed. The court of appeals rejected that argument at the outset (Pet. App. 6a-10a), holding *Arkansas* v. *Sanders* applicable retroactively, at least as to searches subsequent to *United States* v. *Chadwick*, 433 U.S. 1 (1977). As is explained in our petition (Pet. 5 n.1) we are doubtful of the soundness of that ruling, but have chosen not to seek further review on that point here.

States v. *Chadwick*, 433 U.S. 1 (1977), where police suspicion amounting to probable cause was focused upon the containers that were searched rather than the vehicles in which they were placed, and the instant case, where the officers' suspicion focused on the vehicle itself rather than any particular parcel contained in it. Reading *Sanders* to disapprove the decision in *United States* v. *Finnegan*, 568 F.2d 937 (1977), in which the Ninth Circuit had drawn such a distinction, the court rejected application of the automobile search exception as a basis for sustaining the search.

The court next considered (Pet. App. 19a-27a) whether the rule of *Chadwick* and *Sanders* might be limited to relatively substantial containers, and thus be inapplicable to respondent's paper lunch bag. Declining to adopt what it termed "an unworthy container rule" (Pet. App. 23a), the court perceived no distinction "between [respondent's zippered leather] pounch and [the paper] bag * * * that makes theoretical or practice sense" (*id.* at 27a). The court of appeals interpreted the footnote in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 765 n.13, which notes limitations on the reach of that decision, as an exhaustive listing of circumstances in which a warrantless search would be permitted, embracing only containers whose contents are in plain view, or whose appearance otherwise serves to disclose their contents (Pet. App. 25a). The court stated its view that an exception based upon the nature of, and the conventional uses associated with, certain classes of containers "would snare those without the means or the sophistication to use worthy containers" and "would destroy the coherence of a well-established, clear, eminently manageable rule that, absent special necessity, a search must rest upon a search warrant" (*id.* at 24a-25a; footnote omitted). The en banc court accordingly concluded that the contents of the paper bag, as well as those of the leather pouch, should have been suppressed (*id.* at 27a).

Four members of the court dissented. Judge Tamm, who had written the panel opinion, adhered to his original reasoning and conclusions (described at pages 3-

5, *supra*) in an opinion (Pet. App. 28a-47a) joined by Judges MacKinnon and Robb, each of whom wrote separately as well (*id.* at 48a-49a, 50a).[3] Judge Wilkey dissented separately (*id.* at 50a-117a) on the ground that *Arkansas* v. *Sanders*, *supra*, should not be applied retroactively to the search at issue (see *id.* at 53a-77a).[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

Just this past Term, in *Robbins* v. *California*, No. 80-148 (July 1, 1981), this Court considered a question closely related to that presented here. The question in *Robbins* was whether, during a lawful warrantless search of an automobile based upon probable cause, police may, consistent with the Fourth Amendment, search sealed packages wrapped in opaque plastic found in the luggage compartment of the vehicle. The Court held the warrantless search unlawful, but there was no majority opinion.

In granting the petition for a writ of certiorari in the instant case, the Court directed the parties to address the

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[3] Stating that reasonableness "*is* the constitutional standard" for determining whether a search is consistent with the Fourth Amendment (Pet. App. 48a-49a; emphasis in original), Judge MacKinnon would have upheld the warrantless search of the leather pouch as well as the paper bag and would accordingly have affirmed the conviction. Judge Robb joined (*id.* at 50a) Judge Tamm's dissent with respect to suppression of the contents of the paper bag. He joined in the judgment requiring suppression of the contents of the pouch reluctantly, deeming that result compelled by this Court's decisions. However, he noted (*ibid.*) his view that

> the right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room.

[4] Judge Wilkey would, however, have joined the majority as to the issues on the merits, reluctantly concluding that *Arkansas* v. *Sanders* controls this case (Pet. App. 82a, 95a-99a) but criticizing both the decision in *Sanders* (*id.* at 77a-101a) and the exclusionary rule itself (*id.* at 101a-117a). Judge MacKinnon joined in so much of Judge Wilkey's dissent as addressed the retroactivity issue (*id.* at 48a).

question whether it should reconsider the decision in *Robbins*. For the reasons detailed below, we respectfully submit that the analysis employed by the plurality in *Robbins* is mistaken, and that the Court's holding condemning the warrantless search in *Robbins* was erroneous. Even if the Court adheres to the holding that wrapped and sealed packages that meaningfully conceal their contents may not be searched without a warrant, however, it would not be reasonable to extend such a holding to containers as flimsy as respondent's paper bag.

Our submission that *Robbins* requires reconsideration does not depend alone upon our view of the merits of the question presented here and in that case. Rather, further consideration of the decision in *Robbins* is compelled because the Court there failed to articulate principles governing the search of containers found in the course of a lawful vehicle search in any fashion that commanded the support of a majority of the Justices.[5] In view of the

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[5] Indeed, following announcement of the decision in *Robbins*, one court of appeals pointedly observed: "[W]e have no unequivocal instruction from *Robbins* to guide us in our determination of whether a grocery bag, which the record does not reveal as having been sealed or closed," could be searched without a warrant. *Government of the Virgin Islands* v. *Rasool*, 657 F.2d 582, 592-593 (3d Cir. 1981); see *id.* at 595 (Adams, J., concurring). Other decisions rendered after *Robbins* reflect continuing uncertainty as to the rule to be applied. See, *e.g.*, *United States* v. *Mefford*, 658 F.2d 588 (8th Cir. 1981), ~~slip op. 9~~ (upholding warrantless search of paper bag); *United States* v. *Weber*, Nos. 80-1553 etc. (1st Cir. Sept. 30, 1981), petition for rehearing en banc pending (holding, over a dissent, that warrantless opening of a rolled up rainslicker was impermissible); *Sharpe* v. *United States*, Nos. 79-5314 & 79-5315 (4th Cir. Sept. 4, 1981), petition for rehearing en banc pending (holding, over a dissent, that warrantless search of burlap bags believed to contain marijuana was impermissible); *United States* v. *Rivera*, No. 80-1115 (5th Cir. Sept. 2, 1981), disposition of petition for rehearing stayed pending a decision in the instant case (holding warrantless sampling of opaque plastic trash bags believed to contain marijuana impermissible); cf. *United States* v. *Cleary*, 656 F.2d 1302 (9th Cir. 1981), petition for cert. pending, No. 81-953 (filed Nov. 20, 1981) (holding, over a dissent, that warrantless search of a canvas bag with a broken zipper and a gun butt visible at its mouth was impermissible).

uncertainty left by the decision in *Robbins*, the importance of the question presented for law enforcement purposes, and the Court's "institutional responsibility * * * to harmonize [its] views on [such a] constitutional question[] of broad application" (*Robbins* v. *California*, *supra*, slip op. 8 n.4 (Powell, J., concurring)) we urge the Court to reconsider the decision in *Robbins*.

I

Reduced to its essentials, the view of the *Robbins* plurality and of the majority below was that the Fourth Amendment should be construed to make all warrantless searches of containers, of whatever kind or description, unreasonable per se unless the contents of the container are effectively in plain view, consent is given, or exigent circumstances make it infeasible to secure a warrant. We submit, however, that the general analytic approach advanced by Justice Powell in his concurrence in *Robbins*, under which the need for a warrant is linked to objective factors indicating that the proposed search will invade an area vested with substantial privacy attributes, is more faithful to the policies of the constitutional provision and better serves the interests of individuals as well as of society.

A. Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search or seizure. Nevertheless, the provision does require that searches and seizures be reasonable, and this Court over the years has held that various types of searches may not ordinarily be deemed reasonable unless authorized by a warrant issued by a neutral and detached magistrate and satisfying the prerequisites of the Warrant Clause of the Fourth Amendment. The warrant requirement has been applied to homes, offices, hotel rooms, mail, interception of oral communications, and luggage. We have no quarrel here with any of these holdings or with the policy judgments that underlie them. What we do take issue with is the sweeping extension of the warrant requirement embodied in the

court of appeals' holding in this case, which casts Fourth Amendment law adrift from its traditional moorings in reasoned accommodation of individual privacy interests and societal law enforcement interests.

B. It is our submission that the issue whether a search of a container must be supported by a warrant in order to be reasonable under the Fourth Amendment cannot be decided without taking into account the magnitude of the individual privacy interest invaded by the search. The correctness of linking the warrant requirement to the strength of the privacy interests affected by a search is shown by an analysis of the functions served by the warrant in protecting the interests of the individual against unreasonable governmental intrusion. Generally, the procurement of a warrant accomplishes three useful purposes:

1. A warrant serves to limit the scope of a search to those items for which probable cause exists and those areas in which there is reason to believe the items may be located. In the context of a search of a seized container, however, there is no risk of a general or overbroad search, and thus a warrant is not necessary in order to guard against that danger.

2. In at least some contexts, the warrant gives notice to the individual whose premises and effects are to be searched of the existence of authority to conduct the search and of the permissible scope of the search. Again, in the case of a seized container, the scope of the search is not seriously in issue. And little is gained by assuring an individual whose belongings are searched that a search has been judicially authorized when his property has already been lawfully seized without such authorization.

3. For purposes of cases like the present one, the relevant function performed by a warrant is as prophylaxis against the police officer's mistaken judgment that justification exists to undertake the proposed search. No doubt there are occasions when a vigilant magistrate will refuse to authorize a search that an overzealous police officer would undertake if left to his own devices. But

this function of the warrant procedure simply cannot be divorced from consideration of the importance of the privacy interests implicated by a proposed search. An officer who searches a house or taps a telephone without probable cause has intruded unjustifiably into an area to which our society attaches strong privacy interests, causing a grave and largely irreparable injury. If the prophylaxis of a warrant requirement avoids even a relatively small number of unreasonable searches of this nature, the personal security of the citizenry will have been meaningfully advanced. In the context of searches of containers such as respondent's paper bag or Robbins' plastic wrapped parcel, however, the likely benefits of a warrant are drastically reduced, since a mistaken search, far from exposing intimately private matter, will usually disclose nothing more than some items of recently purchased merchandise or the like.

In sum, warrantless searches may be deemed unreasonable to the extent that a mistaken or unjustified search will expose to official view areas or items that traditionally are accorded high privacy value by our society. But as the privacy interests implicated by a particular type of search diminish, so too does the reasonableness of insisting upon resort to the prophylaxis afforded by the warrant procedure.

If we are correct that the applicability of the warrant requirement is in substantial part a function of the magnitude of the privacy interest generally implicated by the type of search to be undertaken, then it is beyond serious dispute that no warrant was required to search respondent's paper bag. A paper bag is a type of container that is only rarely used to transport personal effects of a significantly private character, and that by its nature is poorly designed to shield its contents from disclosure to others, especially if it has come into the possession of a third party.

C. Consideration of the applicability of a warrant requirement to a particular class of searches requires not only an evaluation of the benefits likely to be derived

from such a requirement, but also a weighing of the costs that will thereby be imposed. If, for example, the cost is a substantial risk that evidence will be destroyed (*i.e.*, exigent circumstances), it is universally recognized that the warrant procedure may reasonably be foregone. But even in the absence of exigent circumstances, it is unrealistic to suppose that the warrant procedure is cost-free. At a minimum, it will ordinarily involve several hours of police officers' time to prepare a warrant application and present it to a magistrate—time that could otherwise be spent patroling a beat or performing other law enforcement functions. This cost may be well worth incurring when the proposed search implicates substantial individual privacy interests; it is far harder to justify when such interests are not likely to be at stake.

A warrant requirement for container searches will also often impose costs on the owner of the property to be searched that substantially outweigh the benefits he is likely to derive from resort to the warrant process. Ordinarily, when the police have probable cause to search a container found in an automobile or carried by someone on a public street, they will by the same token have probable cause to arrest the possessor of the container. From the standpoint of the person from whom a container has been seized, particularly one innocent of wrongdoing, it would undeniably seem a lesser intrusion to have the search conducted on the spot than to be arrested and held for several hours while a warrant is sought. It is not a satisfactory answer to say that such an individual may avoid this dilemma by consenting to an immediate search. A police officer is not obliged to accept such a consent, which is after all subject to dispute in a suppression hearing or a tort action, and the officer would indeed be imprudent in doing so whenever a serious crime is under investigation and probable cause appears to be strong.

D. Finally, it has been suggested by the court below and the *Robbins* plurality that a rule requiring warrants for all container searches will provide a valuable "bright

line" test that will help officers in the field to know clearly where their duty lies. We question whether this virtue alone would justify characterizing an otherwise reasonable search as being violative of the Fourth Amendment. But in any event, in this context, the suggestion that broadening the reach of the warrant requirement will in fact provide clear guidance to the officer in the field is unfounded. Rather, the decision below will simply relocate the boundary of uncertainty to such items as open shopping or grocery bags, rolled-up newspapers or clothing, pockets in items of apparel, and the like.

II

The search of respondent's paper bag was also justifiable because it formed an integral part of an otherwise lawful warrantless search of his automobile. The established "automobile search" exception, which serves as the functional equivalent of a warrant to search an automobile, should be construed to authorize searches equal in scope to those permissible under a warrant to search an automobile. As no separate warrant would be required to search a container found in a warrant-authorized search of a car (or a house), no warrant should be required in the circumstances of this case, either. In the setting of this case, recourse to a magistrate for a determination of probable cause to search the respondent's paper bag would have been an essentially sterile exercise, for law enforcement officers had by that time already acted upon their determination that probable cause existed by searching the automobile. Unlike the circumstances considered in *United States* v. *Chadwick*, *supra*, and *Arkansas* v. *Sanders*, *supra*, in this case there was probable cause to search the automobile as a whole. The determination that there was probable cause to search the container was simply a corollary of the earlier conclusion. The conclusion that the contraband sought might lie in the paper bag involved only a rudimentary detective's inference, rather than a judgment concerning the fine points of Fourth Amendment law. Accordingly, recourse to a magistrate at this juncture was not required.

In any event, the imposition of a warrant requirement respecting containers seized from an automobile is logical only when the container involved has substantial privacy attributes which rise above the privacy expectations invested in the automobile itself. Respondent's paper bag, however, had no such qualities. Indeed, an unsealed paper bag cannot reasonably be relied upon to segregate its contents from items lying loose in an automobile and does not convey any expectation of heightened privacy in its contents. The use of such a container renders unreasonable any subjective expectation that privacy will be maintained after it is separated from its owner. Accordingly, no warrant was required to effect the search of respondent's paper bag as part of an otherwise lawful search of the automobile in which it was located.

ARGUMENT

I. A WARRANT IS NOT REQUIRED TO RENDER REASONABLE A PROBABLE CAUSE SEARCH OF A CONTAINER, UNLESS THE CONTAINER IS OF A KIND CONVENTIONALLY REGARDED AS EMBODYING A SUBSTANTIAL PRIVACY INTEREST

While the express language of the Fourth Amendment does not require police to obtain warrants in any circumstances, this Court has relied upon the reasonableness requirement of that provision in holding that "normally searches of private property [must] be performed pursuant to a search warrant issued in compliance with the Warrant Clause." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 758.[6] Accordingly, on several recent occasions

[6] As an historical matter, it seems relatively clear that the Fourth Amendment was not designed to ensure or understood to require that searches generally be based upon warrants. The provision was adopted against the background of widespread opposition, both in Great Britain and in the American colonies, to the use of general warrants, which authorized the search of any dwelling and the arrest of any person, without any showing of probable cause. N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 37, 43-44 (1937). In addition, the former colonists reacted to the despised

the Court has held that absent exigent circumstances, consent, or circumstances constituting a proper search incident to arrest, a warrant is required before police may search a particular kind of container, even though they have probable cause to believe that it contains contraband or evidence of a crime, and even though the container is lawfully seized from a motor vehicle. *Robbins* v. *California*, *supra* (securely wrapped and sealed parcel); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762-766 (suitcase); *United States* v. *Chadwick*, *supra*, 433 U.S. at 11-13 (double-locked footlocker). It is our submission, of course, that none of the foregoing cases is controlling here. We also urge that to the extent the plurality opinion in *Robbins* v. *California*, *supra*, extends the holdings of *Chadwick* and *Sanders* (see *Robbins* v. *California*, *supra*, slip op. 1 (Powell, J., concurring)), it should be

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writs of assistance, which were open ended general search warrants permitting royal customs officials to enter any dwelling. *Id.* at 54. The historical record reveals that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." T. Taylor, *Two Studies in Constitutional Interpretation* 41 (1969). Indeed, the original draft of the Fourth Amendment was aimed only at controlling use of overbroad warrants. See 1 Cong. Deb. 783 (Gales & Seaton ed. 1834). A modest change of words responsible for the version which became part of our Constitution crept into the Amendment only by seeming inadvertance. See N. Lasson, *supra*, at 101-102; Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 366 n.30 (1921). The language ultimately adopted, of course, does require that all searches be judged by a standard of reasonableness, but the background suggests that no change was intended in the then-settled rule that not every warrantless search was per se unreasonable. Indeed, as this Court long ago noted (see *Carroll* v. *United States*, 267 U.S. 132, 149-153 (1925), a distinction between searches of houses, for which a warrant was required, and searches of goods in transit, which were not so protected, was recognized in the Acts of Congress enacted contemporaneously with the adoption of the Bill of Rights. See Act of July 31, 1789, ch. 5, Section 24, 1 Stat. 43; see also Act of Mar. 3, 1815, ch. 94, Section 2, 3 Stat. 232; Act of July 18, 1866, ch. 201, Section 3, 14 Stat. 178. The 1815 statute authorizing warrantless searches was signed into law by President James Madison, who had proposed the language that ultimately formed the basis for the Fourth Amendment.

reconsidered. Before turning to the particular circumstances of this case, however, we think it appropriate to review the underlying considerations that in our judgment inform this Court's Fourth Amendment decisions.

A. A Warrantless Probable Search Is Reasonable Under The Fourth Amendment When The Social Cost Of Requiring This Additional Procedure Outweighs The Benefits That Would Be Conferred

As noted above, this Court has stated in various contexts that a warrant is presumptively required before a search of private property may be deemed reasonable under the Fourth Amendment. The warrant requirement, however, is not absolute. Exceptions have been recognized "where it was concluded that the public interest required some flexibility in the application of the general rule," particularly where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759; see also *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967); cf. *Terry* v. *Ohio*, 392 U.S. 1, 27 (1968); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880 (1975). Several considerations underlie the recognition that a warrant is not required in certain circumstances. First, the exigencies of the particular situation may make proceeding with a warrantless search imperative. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 455 (1971). For example, where the police are in hot pursuit of a fleeing criminal, they may enter a private dwelling to search for him as well as for evidence and fruits or instrumentalities of the crime. *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967); see also *Payton* v. *New York*, 445 U.S. 573, 583 (1980).[7] Similarly, when

[7] Although the point is often overlooked, the exigent circumstances exception to the warrant requirement is merely an application of the general balancing test. It is not inherently inconceivable that a warrant be required in such situations; rather, the Court has determined that society's interests in law enforcement outweigh the gains to privacy interests from recourse to the

an arrest is made, it is reasonable for the arresting officer to conduct an immediate search of the person arrested as well as the area within his immediate control in order to remove any weapons that he might use in order to effect his escape, and to seize evidence in order to prevent its concealment or destruction. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). And, for identical reasons, the police may, incident to the arrest of an occupant of an automobile, search the passenger compartment of the vehicle, as well as containers within it, for weapons or contraband. *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 6.

Exigent circumstances also have been cited as one basis for permitting warrantless searches of automobiles stopped by the police along the highway. As the Court explained in *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970), "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." See *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761; *United States* v. *Chadwick*, *supra*, 433 U.S. at 12; *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 460; *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925).

But the so-called "automobile search" exception does not require a demonstration of exigent circumstances. A second rationale for dispensing with a warrant—the owner's diminished expectation of privacy—supports " 'warrantless searches of vehicles * * * in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent' " (*United States* v. *Chadwick*, *supra*, 433 U.S. at 12, quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442 (1973)). As the Court explained in *United States* v. *Chadwick*, *supra*,

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warrant procedure. Accordingly, while probable cause is still ordinarily required, a warrantless search is a reasonable search in those instances.

433 U.S. at 12, quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

As a result, the owner's privacy interests in the vehicle's interior are thought to be adequately protected by the requirement that any search be supported by probable cause or other reasonable justification—and by allowing the determination of reasonableness to be made in the first instance (subject to later judicial review) by the searching officers. See, *e.g.*, *Cady* v. *Dombrowski*, *supra*, 413 U.S. at 448 (warrantless search of impounded vehicle reasonable because necessary to recover firearm); *Chambers* v. *Maroney*, *supra*, 399 U.S. at 52 (warrantless search of automobile at police station reasonable because based upon probable cause). Such privacy interests are deemed insufficiently substantial to necessitate the added protections secured by the warrant procedure. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 13.[8]

In holding that the opening of the paper bag found in the trunk of respondent's car violated the Fourth

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[8] Reduced expectations of privacy also justify warrantless administrative searches of pervasively regulated businesses. See *Donovan* v. *Dewey*, No. 80-901 (June 17, 1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 74, 77 (1970). Just last Term in *Donovan* v. *Dewey*, *supra*, slip op. 4, the Court recognized that the warrant requirement is not to be applied in an indiscriminate fashion to all property, irrespective of its character, stressing that "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home * * *." Moreover, in explaining the "pervasively regulated businesses" exception to the warrant requirement, the Court noted (slip op. 5-6) that persons operating such businesses are necessarily aware of the possibility of inspection, and their justifiable expectations of privacy are accordingly limited.

Amendment, the court below concluded that none of the recognized exceptions to the warrant requirement was applicable here (Pet. App. 21a). The court of appeals further declined to "delineate a new" exception applicable in the circumstances of this case (*id.* at 23a-27a). It is our contention, however, that the policies which underlie the established exceptions to the warrant requirement lead to the conclusion that the presence of a warrant is not necessary to establish reasonableness, under the Fourth Amendment, of a search of a paper bag or other insubstantial container that has been lawfully seized based upon probable cause to believe that it contains contraband or evidence of a crime. See *South Dakota* v. *Opperman*, 428 U.S. 364, 382-383 (1976) (Powell, J., concurring).

The issue in this case, as in any case involving the applicability of the warrant requirement, is not the level of justification that is required to support a governmental search of private property or personal effects. If, in order to be reasonable, a search must be supported by probable cause to believe that it will uncover contraband or evidence of a crime, that justification depends upon the facts known to the officer, and it is not increased or diminished by the action of the magistrate in response to a warrant application. The warrant is thus a procedural protection that does not affect the substantive justification for the search. Moreover, the question in any warrant case is not whether the justification for a proposed search or seizure shall be subject to judicial review, but simply the timing of that review. The foregoing is not meant to denigrate the importance and utility of the warrant procedure as a protection against unjustified searches and seizures in many contexts. A search that implicates substantial privacy interests ought not be undertaken without the benefit of reasonable procedural protections for the individual interests involved. But the warrant procedure is not cost-free, and as the advantages it offers diminish, so too does the basis for labeling a substantively justified search unreasonable because of a failure to utilize the warrant procedure.

The Court has previously recognized that exceptions to the warrant requirement are to be fashioned when "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 759. In striking that balance we suggest as a model for analysis the test employed to determine whether particular procedural safeguards satisfy the requirements of due process—an inquiry that has a nature and purpose substantially similar to the inquiry into the desirability of the warrant procedure to protect individual Fourth Amendment interests. As stated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), consideration of three factors is required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirement would entail.

In order to strike this balance it is necessary first to appreciate the interests that are ordinarily served by requiring that a warrant be obtained.

B. The Marginal Benefit Of Requiring That A Warrant Be Secured Prior To Search Of A Low-Privacy Container Lawfully Seized By Police Is Outweighed By The Costs To Society, And To The Individual Whose Belongings Are Seized, Of Requiring This Procedure

1. Traditionally, three basic functions have been ascribed to the requirement that a warrant be obtained prior to undertaking a search of private property. First, as explained by Justice Jackson for the Court in *Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (footnote omitted):

> Its protection consists in requiring that * * * inferences [from evidence relied upon to establish prob-

> able cause for a search] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Second, it is thought that a warrant tends to limit the scope of the search to bounds commensurate with the probable cause underlying its issuance. *United States* v. *Chadwick*, *supra*, 433 U.S. at 9. Third, the presence of a warrant serves to assure persons subjected to a search "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States* v. *Chadwick*, 433 U.S. at 9; *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 532.

As Judge Wilkey explained in his dissenting opinion below the policies ordinarily furthered by the warrant requirement, for instance in the search of a home, have little if any application to the search of a container lawfully seized upon probable cause in a warrantless search of an automobile (Pet. App. 83a-85a; footnotes omitted; emphasis in original):

> When a *container* is seized from an *automobile* after a lawful warrantless search of a car, however, these advantages largely evaporate. First, in the event a warrant does not issue for the containers seized, the level of intrusion is reduced modestly, if at all. The car's occupants already have been stopped, detained and deprived of control over the seized container. In all likelihood, they also have been arrested, for in most cases probable cause to search for contraband will also provide probable cause to arrest its possessors. Should they be arrested, the car's occupants will in addition be subject to searches of their persons and of the area within grabbing distance of them. At this point, if a warrant fails to issue, the additional intrusion they have been spared is surely minimal compared with that which has gone before. By contrast, when a warrant does not issue for the search of a dwelling, the householder is spared even knowledge of the proposed search.

A warrant requirement for containers, moreover, does not define the area to be searched and the objects to be seized; the car has already been searched and the containers seized by the time the warrant issues. Just as obviously, the warrant requirement for searches of containers found in a car does not serve the function of reassuring the occupants of the officer's lawful purpose and authority. After they have been stopped, searched, deprived of control over their property, and taken to the police station, the moment for reassuring the car's occupants of the lawful purpose of the police long since will have passed.

A warrant requirement for *containers* thus provides only a small fraction of the protection assured by the warrant requirement for *dwellings*. How little is left is demonstrated by considering what value a warrant would be if the same rules applied to the search of houses as to the search of cars. Were the warrant requirement for houses to parallel that for cars, officers with probable cause would be authorized to enter a house without producing a warrant, to range free throughout the house while examining its contents, to open cupboards, closets and anything else immovable, then to scoop up any suspicious containers for removal to the stationhouse, probably with the householder himself in tow. After considerable delay, the officers would then triumphantly present the startled householder with a warrant authorizing the opening of the containers seized. Innocent householders could be expected to consider this belated appearance of a warrant a nearly useless afterthought. It is hard to see why drivers and passengers should react otherwise.

See also *South Dakota* v. *Opperman*, 428 U.S. 364, 382-384 (1976) (Powell, J., concurring).

These observations are fully applicable to any situation in which a container has been seized without a warrant on the basis of an officer's determination that probable cause exists. The only interest advanced by requiring recourse to a magistrate in such cases is pro-

tection against misjudgments by overzealous officers regarding the existence of a reasonable basis in the available facts to justify the search.[9] In some proportion of cases, the interposition of a neutral and detached judicial officer will serve to prevent an unjustified intrusion.[10] Where the proposed search is of items or areas generally recognized as enjoying substantial privacy attributes, it is reasonable to insist upon a warrant because of the social judgment that the costs of an unjustified search of such a high privacy area are unacceptable. The prophylaxis provided by the warrant requirement, even if only a relatively small number of unreasonable searches are thereby avoided, is deemed of sufficient value to justify the conclusion that warrantless searches are unreasonable in such circumstances.

The decisions in *Chadwick* and *Sanders* are entirely consistent with this understanding of the relationship of the warrant requirement to the reasonableness criterion of the Fourth Amendment. Sufficiently strong individual privacy interests were thought to be associated with luggage[11] that an important purpose was served by the warrant procedure in guarding against inadequately justified searches. This justification loses its force, however, when transposed to the context of paper lunch bags such as that seized from the trunk

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[9] As Justice Rehnquist observed in his dissent in *Robbins*, *supra* (slip op. 3), the premise that the warrant requirement provides consistent and meaningful protection to persons whose property may be subject to search is itself open to question. This Court has not interpreted the Fourth Amendment to require that warrants be issued by a lawyer or a judge (see *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972)), and it has acknowledged that the presence of a warrant secured from a magistrate after a hearing does not necessarily "suffice to discourage lawless or reckless misconduct" by police. *Franks* v. *Delaware*, 438 U.S. 154, 169 (1978).

[10] As noted by Judge Wilkey, the incremental value of that safeguard following a seizure of the property is limited.

[11] Luggage was described in *Sanders* as "a common repository for one's personal effects, and therefore * * * inevitably associated with the expectation of privacy" (442 U.S. at 762).

of respondent's car, or even the plastic-wrapped parcel in *Robbins*. As we explain below (pages 29-31) such containers support only a limited expectation of privacy. The costs to Fourth Amendment interests associated with an officer's mistaken assessment of probable cause as to such a container are accordingly substantially less than those associated with an unreasonable intrusion into a home or even into luggage or some other conventional repository of personal effects. For example, if the officer in this case had erred in his judgment that the small paper lunch bag in the trunk of respondent's automobile contained illicit drugs, the likely result is that he would have discovered that it contained recently purchased merchandise or perhaps respondent's next meal.[12] Although it is not to be doubted that the owner has some privacy interest in even these items, it is equally apparent that this interest is simply not comparable to that which attaches to the contents of homes, offices, private communications, or even luggage, and which has prompted the Court to extend to all of those areas the protections of the warrant procedure.

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[12] In *Robbins* v. *California*, *supra*, the plurality noted (slip op. 7-8 n.2) the comments of the dissenting judge in the California Court of Appeal respecting the container there at issue:

> For all that I see, it could contain books, stationery, canned goods, or any number of other wholly innocous items which might be heavy in weight. In fact, it bears a remarkable resemblance to an unlabelled carton of emergency highway flares that I brought from a store and have carried in the trunk of my own automobile.

People v. *Robbins*, 103 Cal. App. 3d 34, 44, 162 Cal. Rptr. 780, 785 (1980) (Rattigan, J., dissenting). These comments were offered to show that the exterior of the package in question did not, contrary to the view of the California court majority, reveal its contents. However, they serve even more tellingly to demonstrate that if the California patrolman's judgment that marijuana was inside the package had proven unfounded, Mr. Robbins would not have suffered the kind of intrusion into highly private possessions for which the prophylactic requirement of advance judicial authorization is really valuable.

2. On the other hand, the cost of requiring procurement of a warrant to achieve the marginal benefits of minimizing these limited intrusions would be inordinately high. As Justice Powell explained in his concurring opinion in *Robbins* (slip op. 5):

> Confronted with a cigar box or a Dixie cup in the course of a probable cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values.

Affording the limited privacy interest in the contents of a paper bag (or other containers not "inevitably associated" with substantial privacy values) the added protection of the warrant procedures does not, we submit, justify removing a police officer from other duties while he or she engages in the frequently lengthy and burdensome task of securing a warrant.

Equally important, the warrant requirement threatens injury to other Fourth Amendment interests of the owners of such parcels. As Judge Wilkey noted in his dissent (Pet. App. 91a-92a), the officer's belief that probable cause exists to seize and search a container found in someone's possession in an automobile or a public place usually also gives rise to probable cause to arrest the possessor of the container. For the innocent person whose bag or parcel does not in fact contain contraband or evidence of a crime, the injury to Fourth

Amendment liberty interests entailed in a custodial arrest while a warrant is sought would ordinarily be considerably more serious than the injury arising from an immediate warrantless search, which may result in prompt exoneration of the individual, a speedy return of his property, and the freedom to proceed about his business forthwith.[13]

In *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764 n.12, the Court suggested that, whenever the owners of containers suspected of containing contraband find unac-

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[13] The universe of cases in which an officer has seized a container believing he has probable cause to do so and intending to search it may be usefully divided into four categories:

(1) The officer is correct in his belief that probable cause exists, and in fact the container has in it contraband or evidence of a crime. In such a case, while an immediate warrantless search would not avoid arrest and incarceration, the failure to obtain a warrant has turned out to be harmless.

(2) The officer is correct in his belief that probable cause exists (so that a warrant would issue if one were sought), but the contents of the container were in fact innocent. In this case, too, the failure to procure a warrant is harmless, since the search would occur in any event, but the warrant procedure will have caused a serious added and unnecessary burden for the suspect.

(3) The officer is mistaken in his belief that probable cause exists, but the magistrate makes the same error. In this situation recourse to the warrant procedure will have failed to afford protection to the suspect's privacy interests, while still exacting a substantial cost from the detention while the warrant is procured.

(4) The officer is mistaken in his belief that probable cause exists, and the magistrate refuses to authorize a search of the seized container. Only in this class of cases (the incidence of which is speculative) will the warrant procedure have performed a useful function in protecting Fourth Amendment interests. Even here, however, the extent of the injury suffered by an immediate unjustified search will usually be slight in the case of low-privacy containers, so that the protection afforded by the warrant procedure will often prove unwelcome to the individual whose property and perhaps person have been detained while the warrant was sought.

ceptable the inconvenience of detention while the police obtain a search warrant, the inconvenience may be avoided by simply consenting to a search. While this appears at first blush to be a satisfactory response to the concern that a warrant requirement may substantially burden the interest of suspects (especially innocent ones) in freedom from a possibly lengthy period of arrest while a warrant is sought, closer analysis discloses serious problems. Because the suspect who consents to a search waives constitutional protections guaranteed by the Fourth Amendment, the consent must be given freely and voluntarily. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 249 (1973). The question whether a consent to search was voluntary or was the product of duress "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Factors that are pertinent to this determination include not only the conduct of the police—whether the suspect was threatened, placed in custody, and/or advised of his right to refuse to consent—but may also include some factors that are not necessarily apparent to the officer—including the suspect's knowledge of his right to refuse, his age, intelligence, education, and state intoxication. See, *e.g.*, *id.* at 226 (relevance of lack of education and low intelligence); *United States* v. *Mendenhall*, 446 U.S. 544, (558-559 (1980) (opinion of Stewart, J.) (knowledge of right to refuse is "highly relevant" to determination of consent; suspect's race and education also relevant factors). Ironically, special difficulties in judging the voluntariness of consent may be created by the incentive to consent in cases such as this: *i.e.*, that the alternative to giving consent is the inconvenience and stigma (especially for the innocent persons) associated with arrest, booking, and incarceration (see Pet. App. 93a).

A police officer is under no obligation to proceed with an immediate search simply because the suspect has consented to it. In view of the difficulty of determining on the spot whether consent is voluntarily given in the constitutional sense and the risk that even a consent that is in fact

voluntary will not be found to have been so at a subsequent judicial hearing, it is risky law enforcement practice to rely upon a putative consent that may later be found invalid, thereby rendering the search unlawful even though supported by probable cause. Thus, absent exigent reasons for proceeding upon a consent (which, of course, would themselves obviate the need for a warrant) consent will frequently prove to be an illusory alternative to the substantial intrusion of arrest. In any event, law enforcement officers should not be required to rely upon consent as the sole basis for warrantless searches of insubstantial containers that have been lawfully seized.

Given the available alternatives, an immediate search of a seized container based upon the officer's own assessment of probable cause would usually constitute a lesser intrusion on the owner's privacy interests than arrest and detention pending application for a search warrant. See *Chambers* v. *Maroney*, *supra*, 399 U.S. at 51-52. The costs of requiring a warrant to search containers which do not exhibit substantial privacy expectations are accordingly disproportionate to whatever incremental privacy protection might be achieved by imposition of such a requirement. For purposes of protecting the residual privacy interest that does attach to the contents of paper bags and similar containers, it is sufficient that such searches must be based upon the police officer's possession of probable cause, and that his determination of that question is subject to full post-search judicial scrutiny.[14]

We recognize that the choice between detention and an immediate search is not squarely presented where there are independent grounds for arresting an individual apart from the suspected contents of the con-

[14] Here, of course, it is undisputed that the search was supported by probable cause (see Pet. App. 19a-20a n.22). When reasonable justification for a search was lacking at the outset, a civil damages remedy may be available. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971).

tainer.[15] The rule, however, should be based upon the general nature of the situations it covers. Moreover, as is explained above (pages 21-23, *supra*), a warrant serves its usual functions weakly, if at all, whenever the owner of a seized container has been arrested. In such circumstances, not only has the owner's automobile been stopped and searched, and the container seized, but the owner and the entire passenger compartment of the automobile and any container found therein may be searched without a warrant as an incident to the arrest. See *New York* v. *Belton*, *supra*, slip op. 6-8; *United States* v. *Robinson*, 414 U.S. 218 (1973); *Chimel* v. *California*, 395 U.S. 752 (1969). Moreover, an inventory search of the respondent's automobile would have been permissible, so long as it was undertaken pursuant to uniform police practices and was not a pretext for an investigatory search. *South Dakota* v. *Opperman*, 428 U.S. 364, 376 (1976). Accordingly, when independent grounds for an arrest exist, the additional intrusion effected by the search of the container is especially modest. When the container in question does not support substantial privacy expectations capable of surviving separation from its owner, the policies of the Fourth Amendment are little, if at all, advanced by imposition of a warrant requirement.

C. Most Bags And Parcels Cannot Support A Justifiable Expectation Of A Substantial Degree Of Privacy

In *United States* v. *Chadwick*, *supra*, 433 U.S. at 12-13, the Court recognized that the "automobile exception" to the warrant requirement rests in part upon the lower expectation of privacy attached to a motor vehicle, as compared to homes and offices. Similarly, in *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761, the Court noted that the

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[15] Respondent was arrested upon discovery of a gun and ammunition. He was charged with weapons law violations under District of Columbia and federal law (D.C. Code Ann. § 22-3204 (1973); 18 U.S.C. App. 1202(a); see Pet. App. 6a, 123a) but was not convicted on these counts.

"automobile exception" rests in part upon "the configuration, use, and regulation of automobiles [which] often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." In each case, however, the Court declined to extend the automobile exception to the luggage involved, or to fashion a comparable exception applicable to such containers, stressing that "luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13.

On the other hand, the Court made it clear in *Sanders*, (442 U.S. at 764 n.13) that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment," offering by way of example

> containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. * * * There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched * * *.

Id. at 764-765 n.13.[16] The Court's caveat left the status of containers other than personal luggage "hanging in

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[16] Both the court below (see Pet. App. 25a) and the plurality in *Robbins* (slip op. 6-7) concluded that the exceptions listed by the Court in *Sanders*—containers whose contents are in plain view and those whose contents are inferrable from their outward appearance—constituted an exhaustive listing of exceptions to the warrant requirement, rather than merely examples. To say the least, that seems a strained interpretation of the Court's language in *Sanders*. If the listing in *Sanders* were intended to be all-encompassing it would hardly follow that "[t]here will be difficulties in determining which parcels taken from an automobile

limbo" (*id.* at 768 (Blackmun, J., dissenting)). Prior to this Court's decision in *Robbins*, the lower courts had shouldered the task of determining which kinds of containers and packages activate the warrant requirement of the Fourth Amendment. Invalidation of warrantless probable cause searches was generally reserved for searches of containers that normally function as repositories for personal effects or papers, or that represent the functional equivalent of luggage, such as suitcases, briefcases, purses, duffle bags, knapsacks, and gym bags.[17] With the exception of the decision by the court below sitting en banc, however, and the decision in *United States* v. *Moschetta*, 646 F.2d 995, 958-959 (5th Cir. 1981), petition for cert. pending *sub nom. United States* v. *Spieler*, No. 81-908 (filed Nov. 13, 1981) which relies directly upon the opinion in the instant case, the courts of appeals generally declined, prior to *Robbins*, to extend the warrant requirement to paper and plastic bags and packages.[18] As

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require a warrant for their search * * *," or that "[o]ur decision in this case means only that a warrant generally is required before personal luggage can be searched * * *." *Arkansas* v. *Sanders*, 442 U.S. at 765 n.13.

[17] See, *e.g.*, *United States* v. *Presler*, 610 F.2d 1206 (4th Cir. 1979) (briefcases); *United States* v. *Miller*, 608 F.2d 1089 (5th Cir. 1979) (portfolio); *United States* v. *Montano*, 613 F.2d 147 (6th Cir. 1980) (suitcase); *United States* v. *Meier*, 602 F.2d 253 (10th Cir. 1979) (knapsack). The panel opinion in the instant case collects other, similar decisions (Pet. App. 129a n.3).

[18] In addition to the panel opinion in the instant case, see *United States* v. *Foskey*, 636 F.2d 517 (D.C. Cir. 1980) (paper bag); *United States* v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) (plastic and paper bags); *United States* v. *Mannino*, 635 F.2d 110 (2d Cir. 1980) (plastic bag); *United States* v. *Markland*, 635 F.2d 174 (2d Cir. 1980), cert. denied, No. 80-6454 (May 18, 1981) (beverage bag); *United States* v. *Delos-Rios*, 642 F.2d 42, 46 (2d Cir.), cert. denied, No. 80-6420 (Apr. 27, 1981) (paper bag); *United States* v. *Bush*, 647 F.2d 357, 370-371 (3d Cir. 1981) (cardboard box); *United States* v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) (pharmacy bag); *United States* v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) (closed paper bag); *United States* v. *Jimenez*, 626 F.2d 39 (7th Cir. 1980) (paper bag); *United States* v. *Mackey*, 626 F.2d 684

is indicated above (see page 8 note 5), subsequent to *Robbins* the courts of appeals have generally continued to draw this distinction, except where they have deemed it to be foreclosed by *Robbins* itself. See, *e.g.*, *United States* v. *Weber*, Nos. 80-1533, *et al.* (1st Cir. Sept. 30, 1981), slip op. 16-17, petition for rehearing en banc pending; *Sharpe* v. *United States*, Nos. 79-5314 & 79-5315 (4th Cir. Sept. 4, 1981), slip op. 12, petition for rehearing en banc pending; cf. *United States* v. *Cleary*, 656 F.2d 1302, 1306 n.9 (9th Cir. 1981), petition for cert. pending, No. 81-953 (filed Nov. 20, 1981).

The line drawn by the courts of appeals responds not only to the language of *Sanders* but to the factors that have traditionally been employed to determine the scope of Fourth Amendment protection: the precautions taken to preserve privacy, the manner in which the interested individual has employed the object or location to be searched, and applicable property rights insofar as they also reflect widely-shared privacy expectations. See *Rakas* v. *Illinois*, 439 U.S. 128, 152-153 (1978) (Powell, J., concurring). Particularly significant has been the individual's interest or lack of interest in assuring privacy, as evidenced by the "configuration [and] use" of the container involved, a fundamental basis for the automobile exception. *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 761. Just as an automobile operated on public roads must, as a practical matter, be deemed subject to a degree of official and unofficial scrutiny quite different from that affecting a home or office (*Chambers* v. *Maroney*, *supra*, 399 U.S. at 48; *Carroll* v. *United States*, *supra*, 267 U.S. at 153), a paper bag or similar container lacks the integrity, privacy and security attributes of luggage that explain the results in *Chadwick* and *Sanders*. See 442 U.S. at 764.

(9th Cir. 1980) (same); *United States* v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) (same); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979) (plastic bags of marijuana); but cf. *United States* v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), adhered to on rehearing, 615 F.2d 10 (1980) (securely taped and carefully concealed cardboard boxes).

The very nature of a container such as respondent's paper bag is incompatible with maintenance of a reasonable expectation that its contents will be cloaked from public exposure, especially once it has left its owner's hands. As Judge Tamm noted in his dissent below (Pet. App. 41a-42a):

> [P]aper bags offer at best only minimal protection against accidental and deliberate intrusions. A paper bag can fall open or break very easily. It presents no real obstacles to invasions by the curious or the dishonest once it has left its owner's actual possession. Because it is neither so secure nor so permanent as typical forms of luggage, its contents are much more likely to become subject to public display than if the same items had been stored in luggage. Thus, it is doubtful that one realistically can expect a paper bag to remain closed or intact, its contents unrevealed, at least if it has left its owner's hands.

This analysis, which has been widely employed by the courts of appeals (see, *e.g.*, *Government of the Virgin Islands* v. *Rasool*, *supra*, 657 F.2d at 591; *United States* v. *Mackey*, 626 F.2d 684, 687 (9th Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980); *United States* v. *Honigman*, 633 F.2d 1336, 1338 (9th Cir. 1980); see also 2 W. La Fave, *Search and Seizure* § 5.5, at 365 (1978)), properly focuses attention upon the level of privacy that may reasonably be expected *after the container has been separated from its owner*—*i.e.*, when, as here, a lawful seizure of the container has occurred. For it is only if a reasonable expectation of privacy survives such a seizure that the incremental protection offered by the warrant procedure will have meaningful application.[19]

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[19] Thus we note that the question is not, as some courts have stated (see, *e.g.*, *United States* v. *Cleary*, *supra*, 656 F.2d at 1305; see also *Robbins* v. *California*, *supra*, slip op. 5-6 (plurality opinion)), whether the individual has *any* expectation of privacy in the item to be searched. We do not contend that a random search of respondent's container, based on no articulable suspicion, would be permissible. In fact the search here was based upon probable cause and subject to post-search judicial scrutiny. The question

The en banc court of appeals held that the proper police procedure in this case would have been to remove the unsealed paper bag and the leather pouch from the trunk of respondent's automobile to "carry them unopened to a magistrate" (Pet. App. 22a). The very act of gathering up an unsealed flimsy container, however, will frequently reveal its contents to an officer's senses or cause spillage that will lead to the same result. The contents of an open paper bag may be seen, simply by holding the bag in a particular manner. A paper bag like respondent's, which is folded or crumpled at the top but not sealed, may well come open simply by the passage of time—a process which is expedited by handling, however careful. Other pertinent examples can be gleaned from the decisions of the courts of appeals that have accumulated in the wake of *Chadwick* and *Sanders*. For instance, in *Barger* v. *United States*, No. 80-5130 (6th Cir. Apr. 28, 1981), cert. denied, No. 80-6914 (Oct. 5, 1981), the container was an unsealed pillowcase, which contained stolen silverware. If held from the bottom the pillowcase was likely to disclose its contents to the touch. If held from the top, it might well disclose its contents to the sight. And in *United States* v. *Weber*, *supra*, police seized a rolled up rainslicker containing a walkie-talkie, which could well have fallen out in normal handling or have been perceptible to the touch. Whether or not the contents of such containers come into "plain view" is purely a matter of accident.

Having taken none of the precautions which are socially recognized as manifesting a reasonable and realistic expectation that privacy will be maintained, the owners of such containers are no more entitled to claim the benefit of the warrant procedure than the owners of containers whose "contents can be inferred from their out-

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here is simply whether any expectation of privacy whatsoever, however limited, should be deemed sufficient to mandate imposition of a warrant requirement in addition to the fundamental requirement that the search rest upon probable cause. Of course, where there is no expectation of privacy whatsoever, there is no search, and thus no intrusion subject to the Fourth Amendment *vel non*.

ward appearance" or which are "open to 'plain view,' thereby obviating the need for a warrant." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 765 n.13; *Harris* v. *United States*, 390 U.S. 234, 236 (1968). Indeed, unless this is so, a police officer may be required to take special pains not to learn what his or her senses might otherwise discern from normal handling of such a container, lest the issue arise whether the disclosure of its contents through handling was inadvertent or manipulated, unavoidable or avoidable.[20]

Indeed, even before they have been separated from their owners, paper bags and similar containers, unlike luggage and other secure containers, are not "inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 762, citing *United States* v. *Chadwick*, *supra*, 433 U.S. at 13. Suitcases and similar items typically function as portable closets and chests of drawers; they serve as repositories for clothing toiletries, personal or business records, and the most intimate items associated with daily living. The same, however, cannot be said of paper lunch and grocery bags or even a plastic-wrapped parcel such as was at issue in *Robbins*. The intended and typical function of these containers is simply to facilitate the movement of merchandise, or to contain bulk items. In view of this functional distinction and the scant protection afforded personal effects, "a reasonable man would [not] identify a paper bag as

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[20] Yet another example of such a container is provided by *United States* v. *Cleary*, *supra*. There, an open canvas bag with a broken zipper was seized, based upon probable cause, in the course of a warrantless search of a motor vehicle. The butt of a handgun was visibly protruding from the bag. The gun was removed by police at the scene of the search of the van, unloaded, and replaced in the bag. The bag was then taken to a nearby police station, at which time the gun was again removed. In removing the gun the second time some newspaper in the bag was shifted, thereby revealing a stack of counterfeit currency. In our view, the placement of the gun at the mouth of the bag rendered unreasonable any expectation that, once the bag had been seized, police would not remove the weapon and thereby discover what lay underneath.

a normal place to entrust his intimate personal possessions" (Pet. App. 42a) (Tamm, J., dissenting). Thus, the *Chadwick* Court's reasoning distinguishing, for purposes of the warrant requirement, automobiles from dwelling places is equally applicable to paper bags and other insubstantial packages: "One has a lesser expectation of privacy in [a paper bag] because its function is transportation [of merchandise or bulk items] and it seldom serves as * * * the repository of personal effects * * *." 433 U.S. at 12, quoting *Cardwell* v. *Lewis*, *supra*, 417 U.S. at 590. Accordingly, the considerations which underlie the "automobile exception" to the warrant requirement are equally applicable to respondent's paper bag or Robbins' parcel.

The court of appeals rejected this conclusion, however, suggesting that what it termed an "unworthy container rule" would ensnare those without the means or sophistication to store or transport their personal effects in commonly accepted forms of luggage (Pet. App. 24a). We recognize, of course, that a common grocery bag or a similar container may at times be pressed into service as a repository for personal effects. But the theoretical possibility of such atypical use, without more, does not justify treating all such containers as though they were luggage or other more conventional repositories of private effects, for unrepresentative use is not part of the conventional "understandings that are recognized and permitted by society," which are the touchstone for assessing the scope of the Fourth Amendment protection. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12; see *Robbins* v. *California*, *supra*, slip op. 6 n.3 (Powell, J., concurring); *United States* v. *Goshorn*, *supra*, 628 F.2d at 700 (mere possibility that bag will be used as luggage does not lead to the conclusion that such containers are inevitably or even ordinarily associated with an expectation of privacy). For example, it does not follow that simply because some people choose to live in an automobile, searches of automobiles generally must be made subject to a warrant requirement. Indeed, in

Cardwell v. *Lewis*, *supra*, 417 U.S. at 590, the Court recognized that "because its function is transportation," the mere possibility of use of a motor vehicle as a residence did not alter the limited expectation of privacy in its interior for purposes of application of the Fourth Amendment.[21]

D. The Imposition Of A Warrant Requirement For All "Container" Searches Cannot Be Justified On The Ground That It Will Provide A Clear "Bright Line" Rule

In rejecting the argument that, for purposes of determining whether a warrant is indispensable to a "rea-

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[21] This case does not present the question whether, by reason of its particular features, its appearance, its surroundings, the conduct of the person claiming Fourth Amendment protection, or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for low-privacy uses as to render a warrantless search of the particular container unreasonable. See *United States* v. *Markland*, *supra*, 635 F.2d at 177; see also Pet. App. 42a-43a nn.5 & 6 (Tamm, J., dissenting). It may be, for instance, that the markings or appearance of a parcel make it apparent that it is destined for dispatch by mail—a status that activates the protection of the Warrant Clause. See *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Or the construction of the container, the precautions taken to secrete it, or its markings may demonstrate that the owner desires and expects to retain a high degree of privacy with respect to its contents. See *United States* v. *Dien*, *supra*, 609 F.2d at 1044-1045 (defendant manifested an expectation of privacy by securely taping cardboard boxes and secreting them behind a plywood barrier). Finally, in some cases, the owner's circumstances or his surroundings might make it apparent that a paper bag or similar container is a repository for personal effects. Where these or other similar objective factors that give notice of a special expectation of privacy attached to a paper bag or its equivalent are present, and that expectation is reasonable in light of the physical attributes of the container, a warrant could perhaps reasonably be justified as a precondition to a search. Absent such circumstances, however, an owner's subjective expectation of privacy (and there is no showing here that respondent had any such subjective expectation) should be insufficient to trigger the warrant requirement. See *Katz* v. *United States*, 389 U.S. 347, 360-362 (1967) (Harlan, J., concurring).

sonable" search, there is a distinction between luggage or comparable repositories for personal effects and less substantial containers, both the court below and the plurality in *Robbins* suggested that recognition of such differences would impose a serious burden upon courts and law enforcement officials by requiring them to make judgments as to which containers could be searched without a warrant. See Pet. App. 4a, 23a-25a; *Robbins* v. *California*, *supra*, slip op. 6 (plurality opinion). On the other hand, the inflexible requirement that a warrant be secured to authorize the search of any container whose contents were not in plain view was deemed to constitute an easily understood and administered guide for the police and accordingly to be preferable to a standard based upon the expectation of privacy associated with the container at issue.

To be sure, there are in many contexts advantages to adoption of "bright line" tests that are easily understood and administered by police officers, who frequently lack training in the subtleties of Fourth Amendment law. But laudable as the effort to formulate a "bright line" standard for the guidance of law enforcement officials might be, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment" or abandonment of analysis from the perspective of its policies. *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978). Just as adoption of a simplistic approach granting police broad authority to conduct certain classes of warrantless searches may inpermissibly sacrifice Fourth Amendment protections (*ibid.*), the adoption of an overly broad warrant requirement, designed by its simplicity to foster such protections, will hinder legitimate law enforcement functions by proscribing activities that do not in fact contravene the Amendment's strictures. Thus, in the instant case, the substitution by the court below of a simplified "bright line" test for a standard giving due account to respondent's limited Fourth Amendment privacy interests in his paper bag has produced a rule that is unsupported

by the policy that underlies the Fourth Amendment: the protection of legitimate privacy interests. Like any such bright line rule, the rule announced by the court of appeals has real costs. See *Robbins* v. *California*, *supra*, slip op. 3 (Powell, J., concurring). For the reasons previously explained, the costs of requiring a warrant in cases such as the instant one are disproportionate to the marginal benefits involved.

Moreover, as Justice Rehnquist observed in his dissent in *Robbins* (slip op. 7):

> [A]ny search for "bright lines" * * * is * * * illusory. Our entire profession is trained to attack "bright lines" the way hounds attack foxes. Acceptance by the courts of arguments that one thing is the "functional equivalent" of the other, for example, soon breaks down what might have been a bright line into a blurry impressionistic pattern.

The accuracy of this prediction is revealed by decisions rendered subsequent to *Robbins* (see note 5, *supra*). For instance, although the *Robbins* plurality's analysis would eliminate any uncertainty attendant upon consideration of the privacy expectations attaching to a container, it simply substitutes new uncertainty as to what constitutes a "container" within its intendment. In *New York* v. *Belton*, *supra*, decided the same day as *Robbins*, the term "container" was used to "denote[] any object capable of holding another object * * * includ[ing] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Belton*, *supra*, slip op. 6 n.4. Invoking that broad definition, one court of appeals has held that a rolled up raincoat constitutes a container for purposes of applying the warrant requirement imposed by the *Robbins* plurality opinion. *United States* v. *Weber*, *supra*, slip op. 16-17. A dissenting judge protested that the broad definition of containers applicable to searches incident to arrest that was fashioned in *Belton*, which has the effect of limiting the need to obtain a warrant, should not be applied to

increase the need for warrants in investigative searches of objects found in automobiles, noting that the court's decision would extend the warrant requirement to encompass "blankets, newspapers or other objects which may be used to hold other things" as well. See *United States* v. *Weber*, *supra*, slip op. 21-22 (Coffin, C.J., dissenting).

In any event, we do not believe that substantial practical difficulties in law enforcement will result from adoption of a standard that initially requires case by case delineation of the types of containers possesing high enough privacy attributes to justify insistence upon a warrant. As Justice Powell explained in his concurring opinion in *Robbins* (slip op. 6 n.3), "[m]any containers, such as personal luggage, are 'inevitably associated with the expectation of privacy,' *Arkansas* v. *Sanders*, *supra*, at 762. Many others, varying from a plastic cup to the ubiquitous brown paper grocery sack, consistently lack such an association." In yet other instances, the owner may so manifest his expectation of privacy in a container ordinarily employed for non-private use by his efforts to mark, wrap, seal, or secrete it that law enforcement officials are placed on notice that they should procure a warrant before conducting a search. In any event, all but a relatively small area of uncertainty is likely to be clarified by judicial decisions, which, as previously noted (pages 31-32 & notes 17 & 18, *supra*), had established a relatively clear and consistent pattern until new uncertainties were introduced by the decision below and that in *Robbins*.[22]

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[22] As Justice Powell noted in *Robbins* (slip op. 6 n.3), in borderline cases, when the character of the container is ambiguous and does not lend itself to a ready determination of the owner's privacy expectation respecting its contents, a prudent officer should "err on the side of respecting ambiguous assertions of privacy" by obtaining a warrant. When confronted with a claim that such an ambiguous container was unlawfully searched without procurement of a warrant, the proper course is for the court to conduct a hearing to determine whether the defendant had manifested a reasonable privacy expectation with respect to its contents. "Relevant to such an inquiry should be the size, shape, material, and condition of the

Should the Court conclude, however, that the nature of a container and surrounding circumstances which reflect the possessor's expectations of privacy therein do not supply a workable rule for determining whether a warrant is required, there exists an established "bright line" rule—the "automobile exception" to the warrant requirement—that can serve as a satisfactory guide to police conduct without doing violence to the reasoned balance of individual and societal interests called for by the Fourth Amendment. It is to this doctrine that we now turn our attention.

II. NO WARRANT IS REQUIRED TO SEARCH A CONTAINER DISCOVERED IN THE COURSE OF A LAWFUL SEARCH OF A VEHICLE

Thus far, our argument has addressed the question whether warrantless probable cause searches of relatively low privacy containers that have been lawfully seized by police, such as respondent's bag, are unreasonable per se under the Fourth Amendment in the absence of consent or exigent circumstances. If our foregoing arguments are sound, such searches comport with the Fourth Amendment irrespective of the location from which the container is seized. The argument has special force, however, in the context of the present case, where officers had probable cause justifying a warrantless search of the trunk of respondent's automobile, and the paper bag found therein was simply one of the places where they could reasonably expect to find the contraband for which they had reason to search. See *Robbins* v. *California*, *supra*, slip op. 7 (Powell, J., concurring); *id.* at 1-2 (Blackmun, J., dissenting); *id.* at 3-7 (Rehnquist, J., dissenting); *id.* at 1-3, 5-6 (Stevens, J., dissenting); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 767-768 (Bur-

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exterior, the context within which it is discovered, and whether the possessor has taken some significant precaution * * * that indicates a desire to prevent the contents from being displayed upon simple mischance." *Ibid.*

ger, C.J., concurring in the judgment); *id.* at 772 (Blackmun, J., dissenting).

A. A Search Of A Container Found In The Course Of A Lawful Warrantless Automobile Search Is An Integral Part Of The Search Of The Automobile

It is well established that the privacy interest in an automobile and its contents is sufficiently limited that probable cause suffices to justify a warrantless search of its interior, including a locked trunk or glove compartment. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 12-13; *Chambers* v. *Maroney*, *supra*, 399 U.S. at 48-51; *Cooper* v. *California*, 386 U.S. 58 (1967); *Carroll* v. *United States*, *supra*, 267 U.S. at 153; see pages 17-18, *supra*. The reduced privacy interest that society recognizes in the interior of an automobile renders unnecessary recourse to a magistrate to confirm the officer's judgment that probable cause to search is present. If, in this case, a magistrate had issued a warrant authorizing the search of respondent's car, based upon the information received by officers that indicated that it contained contraband, it could hardly be seriously argued that a further warrant would have been required to permit the search of the paper bag found within that vehicle, or any other container that might have enclosed the contraband believed to be present. *Robbins* v. *California*, *supra*, slip op. 6 (Stevens, J., dissenting); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 573 n.7 (1978) (Stewart, J., dissenting); *United States* v. *DeSimone*, No. 79-5675 (5th Cir. Nov. 2, 1981), slip op. 12739; *United States* v. *Kralik*, 611 F.2d 343 (10th Cir. 1979); *United States* v. *Callison*, 577 F.2d 53, 55 (8th Cir.), cert. denied, 439 U.S. 873 (1978). It is our submission that the scope of the warrantless probable cause search of respondent's automobile permitted by the "automobile search" doctrine in consequence of the limited privacy interest attaching to automobiles should be no different, and, accordingly, that the paper bag seized by police in this case was properly searched without a warrant. See *Robbins* v. *California*, *supra*, slip op. 6 (Stevens, J., dis-

senting); cf. *Warden* v. *Hayden*, 387 U.S. 294, 299-300 (1967).

There is no question but that the search of respondent's automobile was supported by probable cause (see Pet. App. 19a-20a n.22). And the grounds for suspicion known to the officers who stopped respondent extended to the paper bag seized from the vehicle, which was a logical place to store the heroin that he was believed to be distributing.[23] Accordingly, as is explained above (pages 21-23), the warrant requirement does not assure judicial scrutiny of the police officer's determination of probable cause before the beginning of the intrusion—the search of the car. If the officer's assessment of probable cause is sufficiently reliable to permit the warrantless search of the car, it is difficult indeed to see why that very same assessment should be thought to require advance judicial scrutiny when applied to the paper bag. The only added inference that was drawn when the District of Columbia police searched respondent's paper bag was a relatively rudimentary one, *i.e.*, that the bag could well contain respondent's heroin. Such an inference is one professional law enforcement officers are well-situated to make; no expertise in the fine points of Fourth Amendment law is required. The basic policy that underlies the warrant requirement accordingly has little, if any, application to the search of respondent's bag. And, as is noted above (pages 22-23, *supra*), the other functions of a warrant—limiting the scope of the search and providing assurance respecting an officer's authority to the person whose property is searched—have little application to such a search.

Practical considerations militate in favor of application of the automobile exception to containers found therein. Unless law enforcement officers can examine the contents of containers found in an automobile as an incident of a vehicular search, they can never be certain that they have completed their search of the vehicle until

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[23] The informant's tip which led to the search of respondent's automobile was simply that respondent "had narcotics in the trunk of his car" (Pet. App. 14a).

they have detained the driver, secured a warrant to search the container, and executed the search. Thus, whenever the only basis for arrest is the probable cause which supports a search, and no basis for arrest has been found in the search of loose items in the car, the interposition of a warrant requirement may cause a greater intrusion into the affairs of individuals than would be necessary if the container could be searched as part of the automobile search (see pages 21-28, *supra*).

The court below (Pet. App. 18a-19a) rejected the argument that *Chadwick* and *Sanders* were distinguishable because the focus of police suspicion in those cases was upon a particular container, whose presence in a motor vehicle was fortuitous, rather than upon the vehicle itself or an integral part of it. See also *Robbins* v. *California*, *supra*, slip op. 4-5 (plurality opinion). As Justice Stevens noted in his dissent in *Robbins* (slip op. 2-3 & n.3, citing *Arkansas* v. *Sanders*, 442 U.S. at 766-768 (Burger, C.J., concurring)), however, neither *Chadwick* nor *Sanders* truly involved an automobile search. In both cases, the investigating officers had probable cause to believe that a particular piece of luggage contained contraband before it was placed in the vehicle and no basis to search the vehicle except for the purpose of locating the specific container. The Court's holding that the pre-existing obligation to obtain a warrant was not extinguished by placement of the containers in an automobile was thus quite logical, but it of course does not justify the conclusion that either of these cases precludes application of the automobile exception to searches of containers discovered in the course of a probable cause search of a vehicle. *Robbins* v. *California*, *supra*, slip op. 4 (Stevens J., dissenting)[24]

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[24] Language in *Sanders* that may appear to suggest otherwise (442 U.S. at 765 n.13; emphasis added): "[o]ur decision in this case means only that a warrant generally is required before personal luggage can be searched and that *the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.*", is dictum

As Judge Wilkey observed in his dissent, if the automobile exception is held not to embrace any containers found in an automobile, the decisions in *Robbins*, *Sanders*, and *Chadwick*, collectively have the effect of "*abolish[ing] the automobile exception to the warrant requirement as applied in narcotics cases*" (Pet. App. 78a; emphasis in original).[25] This is an ironic result, to say the least, in view of the possessor's total lack of any legitimate possessory interest that society is bound to respect in his contraband.[26] And it is doubly ironic in light of the fact that the automobile search exception was fashioned in *Carroll*, in a setting arising from the problems of inter-

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that the Court should feel free to reexamine as part of its analysis of the fundamental Fourth Amendment issues presented by this case. See *Robbins* v. *California*, *supra*, slip op. 7 (Powell, J., concurring); *id.* at 5 (Stevens, J., dissenting). See also pages 46-47, *infra*.

[25] As Judge Wilkey explained (*ibid.*):

> Traffickers do not spoon contraband powders into glove compartments or shovel them into trunks; narcotics are transported in containers * * *.

[26] Contraband is material the possession of which the law proscribes and to which "'the government is entitled.'" *Carroll* v. *United States*, *supra*, 267 U.S. at 149, quoting *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). Respondent's heroin was contraband subject to forfeiture under both federal and the District of Columbia law, as was the vehicle in which it was being transported and, for that matter, the paper bag that contained it. See 21 U.S.C. 881(f); D.C. Code Ann. § 33-417 (1973). In *Cooper* v. *California*, *supra*, 386 U.S. at 60-61, a warrantless search of an automobile was upheld based upon provisions of California law that authorized seizure and forfeiture of any vehicle used for transportation of narcotic substances. Each of these statutory provisions reflects the diminished property rights society recognizes in contraband materials, and they indicate that such materials cannot support a substantial legitimate expectation of privacy. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 153 (Powell, J., concurring). Where, as here, the wrappings in which contraband is placed do not by themselves reflect an expectation of substantial privacy respecting their contents, the ensuing search must be deemed a fortiori reasonable and permissible under the Fourth Amendment. See Pet. App. 99a-101a (Wilkey, J., dissenting).

dicting illicit trade in another controlled substance—intoxicating liquors. See 267 U.S. at 145-146.

B. Even If Some Containers Discovered In The Course Of An Automobile Search Deserve The Additional Protection Of The Warrant Procedure, There Is No Reasonable Basis For Treating Insubstantial Containers Differently From Compartments Of The Automobile

While we question whether such a decision would meaningfully advance the interests served by the Fourth Amendment, the Court could logically conclude that certain containers, such as suitcases or attache cases, are sufficiently invested with socially valued privacy attributes that their warrantless search is unreasonable even when they are discovered in the course of a probable cause search of an automoble. But the imposition of a warrant requirement respecting containers located in an automobile is logical only to the extent it can reasonably be concluded that those containers have substantial independent privacy attributes that rise above those embodied in the automobile itself and consequently command additional Fourth Amendment protection. This obviously cannot be said for the paper bag respondent used to store his heroin cache, the plastic wrapped parcel containing Robbins' marijuana, or similar containers. Certainly such containers are ordinarily considerably less likely than the glove compartment of an automobile to contain private papers or intimate personal effects. In addition, when contrasted to luggage or briefcases, such parcels, particularly when unsealed, are subject to spillage or tearing and are otherwise likely to reveal their contents as the result of being handled. Thus, it is difficult to see how such parcels could reasonably be said to support an expectation of privacy demonstrably greater than that recognized in the vehicle in which they are placed. See *United States* v. *Mackey*, *supra*, 626 F.2d at 687. The incongruity of a contrary rule is manifested by the decision of the en banc court below. Thus, although the court below acknowledged that respondent's privacy expectation

in the locked trunk of his automobile was insufficient to require procurement of a warrant as a predicate to unlocking and searching it (Pet. App. 20a), it held that, absent "special exigencies," a warrant was necessary before the officers could look into the flimsy, unsealed lunch bag they discovered within it.

Even if the placement of some kinds of containers within an automobile does not necessarily deprive their owners of the level of protection afforded to such containers in other settings, respondent's decision to carry an unsealed paper bag in his automobile, which by reason of its "configuration, use and regulation" limits the driver's legitimate expectation of privacy in its contents, *Arkansas* v. *Sanders*, 442 U.S. at 761, nonetheless reflects a failure to take such reasonable precautions to maintain his privacy as would make application of the the warrant requirement appropriate. See *Rakas* v. *Illinois*, *supra*, 439 U.S. at 152-153 (Powell, J., concurring). Accordingly, the setting in which petitioner's bag was discovered provides an additional indication that the warrantless search of the bag, found by the courts to have been based on probable cause, was a reasonable one.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submited.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERT ROSS, JR., *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether a warrantless search, based upon a finding of probable cause, of a closed, unsealed paper bag, found in the trunk of respondent's automobile, which had been removed from the scene of arrest, to the police station, was permissible under the Fourth Amendment.

II. Whether this Court should reconsider *Robbins* v. *California*, 453 U.S. ____ (1981).

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STATEMENT OF THE CASE

Respondent, Albert Ross, Jr., was convicted in a jury trial of one count of Possession of Heroin with Intent to Distribute, in violation of 21 U.S.C. 841(a). He was sentenced to a term of imprisonment of from twenty (20) months to five (5) years, followed by a special parole term of six (6) years. The conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit, both by a panel and *en banc*.

At a pre-trial motion to suppress evidence hearing conducted by the District Court on February 9, 1979, the following evidence was adduced:

Detective Charles J. Marcum, of the Narcotics Branch of the Metropolitan Police Department received a telephone call from an informant who related that a person known as "Bandit" was observed making a narcotics transaction from the trunk of a car. The vehicle was described as a purplish maroon Chevrolet Malibu parked in front of 439 Ridge Street, N.W., Washington, D.C. After receiving that information, Detective Marcum, together with Detective Cassidy and Sergeant Gonzales responded to the area and observed the vehicle. (H. Tr. 4).[1]

Marcum related that the informant did not have the correct license number of the car, but that it had District of Columbia license plates. Marcum obtained a listing of the tag number on the car and it came back listed to an Albert Ross. The name was run through the WALES NIC computer and came back with a description of Albert Ross, plus the alias "Bandit," (H. Tr. 5).

The Detectives made two passes through the street, the first time getting the tag number. (H. Tr. 7) They went several blocks away and circled the area. They had gone for about five minutes and returned coming down 4th Street off of N Street and at that time observed the vehicle make a right-hand turn off

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[1] "H. Tr." refers to the transcript of the suppression hearing.

of Ridge Street onto 4th street. The vehicle was stopped in the 1200 block of 4th Street. Respondent was ordered out of the car. (H. Tr. 8)

At about the time Respondent was taken out of the car and was being patted down, Sergeant Gonzales opened the passenger door of the car and stated "I found a gun." A subsequent search was made on the scene of the trunk of the vehicle and Marcum testified that a paper bag containing thirty quarter packets of heroin and a maroon purplish color leather purse containing about $3,000 in cash was found. Marcum stated that Detective Cassidy opened the trunk and that Marcum had an opportunity to observe what was in the trunk. (H. Tr. 10)

Respondent was transported to the Narcotics Branch and Detective Cassidy drove the vehicle to Police Headquarters where a further search of the trunk was made in the basement of Police Headquarters. (H. Tr. 11)

When Marcum arrived at the scene, the vehicle was unoccupied and he saw no one on the street who matched the description given by the informant. The vehicle was not examined on either of the two times that the officers saw it parked. (H. Tr. 30)

As to the arrest of respondent, Marcum stated that he was searched and that $345 in cash was in his pocket. (H. Tr. 38) He did not know whether the trunk was opened before the pistol was seized. He looked in the trunk and saw the bag and the red leather purse was laying along side. (H. Tr. 40) Detective Cassidy opened the bag, the items were seized from the vehicle and put back for transportation down to headquarters. (H. Tr. 41) Respondent was in custody on the scene. (H. Tr. 42)

On re-direct examination, Marcum stated that the respondent was handcuffed right after the gun was found. (H. Tr. 46)

The next witness at the motion's hearing was Sergeant Raymond Gonzales who testified that after the car was stopped,

he went to the passenger side of the car. (H. Tr. 48) After respondent was taken out of the car, he saw a .22 calibre bullet laying on the front seat. He searched around by the seat, underneath and in back and then went in to the glove box and found the gun. (H. Tr. 49)

He further stated that after he seized the weapon, respondent was taken out of the car. (It is not clear from the testimony, the sequence) He stated that he told Marcum and Cassidy about the gun. They then took the keys and opened the trunk. (H. Tr. 50)

On cross-examination, Gonzales stated that nothing else was seized from the interior of the car by him, and he did not find anything in the nature of contraband in the interior of the car. (H. Tr. 51) He further testified that he did not look in the trunk and never saw anything in the trunk or removed from the trunk. (H. Tr. 52)

Gonzales testified that he first saw the items allegedly seized by Detective Cassidy at police headquarters. (H. Tr. 53)

Pertaining to the arrest and search on the scene, Gonzales testified that he did not believe that respondent was handcuffed until after he told the officers about the gun and that was before the trunk was opened. (H. Tr. 59)

The next witness at the motion's hearing was Detective David Cassidy of the Metropolitan Police Department. He testified that after respondent's vehicle was stopped, and after respondent was outside of the vehicle, he and Marcum began a search of his person and a short time later, Gonzales stated that he had found a pistol in the glove box of the car. (H. Tr. 66) Cassidy then stated that respondent was handcuffed and the keys were taken from the ignition and the trunk opened. He stated that Marcum had told him that he had information that heroin was in the trunk. (H. Tr. 66)

Cassidy then stated that he observed a brown paper bag in the trunk on the left side, he opened it and saw a number of glassine

bags containing a white powder. He closed the trunk, got in the car and drove it to police headquarters. (H. Tr. 69)

After arriving at police headquarters, he parked the car in the basement went upstairs and got a case to put the evidence in, went directly downstairs and thoroughly searched the car. He opened the trunk and seized the bag containing thirty glassine packets containing a white powder. Alongside the bag was a red leather handbag with a zipper. He unzipped the bag and found a large quantity of money. The rest of the trunk was searched, but no other evidence was seized. (H. Tr. 67)

Cassidy related the events concerning the first sighting of the car and the cruising of the neighborhood. After seeing the vehicle make the right turn on Ridge onto Fourth Street south, the car was pulled over and respondent was told to get out. (H. Tr. 78) After respondent got out of the car he was searched, but nothing "illegal" was taken from his person. (H. Tr. 80) After the trunk was opened, the paper bag was seen. It was closed at the top and Cassidy opened the bag. (H. Tr. 82) The bag was not removed from the trunk. (H. Tr. 82) He did not do anything other than open and look in the bag. (H. Tr. 83)

After getting to police headquarters, he returned to the vehicle after getting a container in which to put evidence and was accompanied by two other officers. The trunk was opened and the paper bag and the red handbag were seized. (H. Tr. 85) He stated that at the scene of the arrest the bag containing the money was never opened. (H. Tr. 86)

Recapitulating the events at the time of the trunk opening at the scene of arrest, Cassidy testified that he opened the trunk, observed the bag, opened the top, looked inside, observed the packets of white powder and closed the trunk. (H. Tr. 91)

Cassidy further related that respondent was ordered out of the car so that he could be arrested and a search could be conducted of the vehicle. (H. Tr. 92)

The above was essentially the evidence upon which the issues involving the search and seizure in this case arose.

The brief for the petitioner sets out the course of this case through the appellate processes below. The respondent has nothing further to add in this connection.

SUMMARY OF ARGUMENT

The respondent, in setting forth his arguments as to why the judgment of the *en banc* Circuit Court opinion should be affirmed has divided his argument into two distinct parts. The first part is directed to the issue as to whether *Robbins* v. *California*, should be reconsidered. The second part deals with the argument that the Fourth Amendment protects the types of containers found in the circumstance of the present case. Respondent feels that consideration of the reconsideration issue logically precedes consideration of the second part for the reasons that an analysis of the authorities which formulate the so-called "automobile exception" to the warrant requirement beginning with *Carroll* v. *United States, infra,* to *Robbins, supra,* places the issues in this case in a proper prospective.

A. Respondent contends that *Robbins* v. *California, infra,* was properly decided and that its result should be reaffirmed by this Court with the hope that a majority, if not a unanimous opinion, will emanate.

This Court has consistently recognized and reaffirmed the proposition that any search is *per se* unreasonable unless conducted pursuant to a warrant secured from a neutral and detached judicial officer that satisfies the warrant clause of the Fourth Amendment.

That certain few, but well delineated, exceptions have evolved from the above requirement. One of the exceptions is the so-called "automobile exception" which had its genesis in the case of *Carroll* v. *United States, infra*. Warrantless searches

of vehicles have been sanctioned, where the vehicle has been stopped on the highway by law enforcement officers on the probable belief that the vehicle contained contraband. This exception was based upon the inherent mobility of the vehicle predicated upon the theory that a possibility of the vehicle being removed and evidence destroyed sanctioned the warrantless search and seizure.

That the exception was expanded by this Court in the case of *Chambers* v. *Maroney, infra,* which would permit the warrantless search of a vehicle not only on the highway where the seizure of the vehicle took place, but also later at a police station.

Respondent views *Chambers, infra,* as constituting a change in the Court's direction in this area; that "inherent mobility" was no longer the sole factor and that searches could be conducted of vehicles at another place for the safety or convenience of the officers even though there was opportunity to obtain a warrant and possibility of removal or destruction of evidence was remote or non-existent.

That in addition to the "inherent mobility" factors, two other factors have evolved in the case law. The first is the "diminished expectation of privacy" concept as it pertains to automobiles and the second is a state or governmental regulation factor. *Cady* v. *Dombrowski, infra; South Dakota* v. *Opperman, infra;* and *Cardwell* v. *Lewis, infra.*

That *United States* v. *Chadwick, infra,* and *Arkansas* v. *Sanders, infra,* sought to make a distinction between certain items seized from a motor vehicle and the vehicle, itself, on the ground that there is a greater expectation of privacy in certain types of containers (being repositories of personal effects) and the vehicle, itself, requiring the intervention of a judicially sanctioned warrant.

The plurality opinion in *Robbins, infra,* while reaffirming the warrant preference as established in prior cases of this Court, was said to establish a "bright line" rule that would require officers to obtain warrants for "insubstantial containers" in which there was no reasonable expectation of privacy. The dissenting opinions would extend the "automobile exception" to the warrant requirement to all property found within the vehicle.

Respondent contends that the "automobile exception" to the warrant requirement should be based solely on the inherent mobility of the object factor, and that where the object has seized, immobilized and the danger of flight or destruction of evidence has been rendered non-existent for all practical purposes, then any search conducted of the object shall be preceded by a judicially issued warrant. Respondent contends that this proposed rule would alleviate the confusion which seems to pervade the entire area. It enhances the integrity of the Fourth Amendment; it protects the citizen by interposing the judiciary between he and the executive; it protects law enforcement by interposing the sanction of the judiciary; and it serves the judiciary by limiting the scope of the review of the search to the supporting documents.

That *Robbins* v. *California, infra,* in its plurality and concurrence reached the correct result. That any meaningful reconsideration would require that the "automobile exception" as to moving objects and personal property contained therein be confined to the exigent circumstance of mobility, which circumstance has ceased to be viable when the object is immobilized and the danger of flight or evidence destruction is rendered, for all practical purposes, remote or non-existent.

B. The Fourth Amendment requires agents of the government to respect the individual's expectation of privacy. The soundest way to ensure that protection is to require that all searches be made with the concurrence of a neutral and impar-

tial magistrate. This concurrence is made in the form of a search warrant. Because of the critical importance that a warrant plays in the protection of Fourth Amendment rights, the general rule is that warrantless searches are *per se* unreasonable.

While there are exceptions to the warrant requirement, these unusual situations must be justified by law enforcement authorities. Such a demonstration of societal need requires that the person seeking to exempt himself from the warrant requirement provide a compelling reason to limit the application of the Fourth Amendment. Compelling reasons have, in the past, been found in the need to preserve evidence from loss or destruction and the protection of law enforcement agents from personal danger. The basis for establishment of these exigent circumstances are, due to the deference paid to the mandate of the Fourth Amendment, very limited.

The Fourth Amendment requires a warrant in all cases where it is practical to obtain one. The reasonableness of a search is no substitute for the lack of a warrant where there is no compelling reason for the warrant's absence. The present search was made without a warrant for which there was no reason — much less a compelling one — advanced for its absence.

The instant search fails to fall within any of the recognized exceptions to the warrant requirement. The most often used exigent circumstance — the automobile exception — cannot justify the warrantless search. Under either a limited view of the exception (warrants required for closed containers in a trunk) or an expansive interpretation (no warrant required for any vehicle contents), the present case involves a warrantless seizure of an automobile for the sole purpose of transporting it to the station house for the warrantless seizure of a paper bag. The reasoning of the automobile exception (mobility, loss, destruction) cannot apply to an automobile taken into police custody for the singular purpose of a seizure of a container in a locked trunk. Nor do any other exceptions justify the present search.

Absent a failure to satisfy any of the recognized exceptions, the petitioner in the present case has sought to create a new one — an unworthy container exception. However the petitioner has elected to ignore the guidelines which this Court has previously utilized to determine the "worth" of a container for purposes of Fourth Amendment protection. Those standards do permit warrantless searches when the contents of the container are made obvious by the shape, weight or appearance. The present container satisfied none of the exceptions — its contents were not inferred by the container. Only opening the container revealed its contents. There is no exception to the warrant requirement for paper containers. The petitioner has yet to demonstrate any compelling reason to create any new exception to the rule.

Moreover the present guidelines are a workable standard upon which the lower Courts and the police officer in the street can gauge the need for a warrant. It is clear that the present guidelines would require a warrant in the instant case. The petitioner has failed to advance any justifiable reason to modify those rules. In addition, the experience to date provides several reasons (e.g. — provides reasonably clear rules that allow a case-by-case examination) for the maintenance of such guidelines.

ARGUMENT

I

ROBBINS v. *CALIFORNIA* WAS CORRECTLY DECIDED

In the Order of the Court granting certiorari in this case, the parties were asked to address the issue as to whether *Robbins* v. *California*, No. 80-148, should be reconsidered. For the reasons stated below, respondent contends that *Robbins* was correcty decided. There was, of course, no majority opinion, and that any reconsideration of *Robbins* should be toward achieving a majority or hopefully a unanimous opinion setting forth principles which would uphold the judgment in the case of the present respondent.

The plurality opinion in *Robbins, supra,* reaffirmed this Court's previous holdings that ". . . a search is *per se* unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the warrant clause of the Fourth Amendment . . ." *Robbins* v. *California,* opinion of Justice Setwart, citing *Agnello* v. *United States,* 269 U.S. 20, 33 (1925); *Katz* v. *United States,* 389 U.S. 347, 357 (1967). The opinion noted the exceptions and identified as one of the exceptions, "the so-called 'automobile exception.' "

The automobile exception had its genesis in the case of *Carroll* v. *United States,* 267 U.S. 132 (1925) which upheld the warrantless search of an automobile, which was stopped by law enforcement officers who believed that it contained contraband. Warrantless searches have been upheld by the Court after the vehicle was seized and removed to a police station. *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Texas* v. *White,* 423 U.S. 67 (1975). This exception was reaffirmed and the aforesaid authorities cited by this Court as recently as October 20, 1980, when the Court vacated and set aside a judgment of the Supreme Court of Colorado which had affirmed the trial court's granting of a motion to suppress evidence. *Colorado* v. *Bannister,* No. 79-1901. In that case, a police officer observed in plain view, stolen property inside a vehicle which had been stopped.

In summarizing the "automobile exception" to the warrant requirement, Chief Justice Burger in writing for the majority in *United States* v. *Chadwick,* 433 U.S. 1 (1977) noted that the treatment of automobiles was based "in part on their inherent mobility," but that warrantless searches of automobiles were sustained "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent." citing *Cady* v. *Dombrowski,* 413 U.S. 433, 441-442 (1973); *South Dakota* v. *Opperman,* 428 U.S. 364, 367 (1976), (as well as *Chambers, supra* and *Texas* v. *White,*

supra.) The latter was based on a "diminished expectation of privacy" concept as it pertains to automobiles. The decision of *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) made the observation that a person has a lesser expectation of privacy in an automobile because its function is transportation and "seldom serves as one's residence or as the repository of personal effects." That it travels with "its occupants and contents in plain view."

The Chief Justice in *Chadwick*, *supra*, went on to note other factors which had been recognized by the court, namely, state regulation of motor vehicles, *Cady* v. *Dombrowski*, *supra*, at 441, as well as custodial acquisition by authorities "in the interest of public safety." *South Dakota* v. *Opperman*, *supra*, at 368.

In summary it appears that the "automobile exception" is predicated upon three factors: (1) inherent mobility, (2) diminished expectation of privacy and, (3) state or governmental regulation of motor vehicle operation.

That with regard to luggage, *Chadwick* holds that there is no diminished expectation of privacy in luggage; it is not subject to governmental regulation, and its mobility evaporates when it is seized by law enforcement officers. *Chadwick*, of course, was reaffirmed in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

In Robbins, the plurality in discussing the government's argument that the nature of a container may diminish the Constitutional protection, rejected that notion holding that the argument is not supported by the Fourth Amendment in that the Amendment protects "people and their effects . . . whether they are 'personal' or 'impersonal.' " The opinion also recognized the difficulty if not the impossibility of setting up an objective criteria as to the types of containers in which an expectation of privacy is manifested and in which it is not.

Justice Powell, although concurring in the judgment, could not accept a "bright line" rule that would require officers to obtain warrants for "insubstantial containers in which no one had a reasonable expectation of privacy." Justice Powell concurred in the judgment because of the facts of the case at hand which he felt evidenced a manifestation of privacy. He recognized "the central purpose of the Fourth Amendment is to safeguard reasonable expectations of privacy."

As was reiterated by Chief Justice Burger in *United States* v. *Chadwick, supra,* ". . . the Fourth Amendment 'protects people, not places, *Katz* v. *United States*, . . . more particularly, it protects people from unreasonable government intrusions into their legitimate expectations or privacy . . ." *Id.* at 7.

The principle that the Fourth Amendment seeks to protect individual expectations of privacy from governmental intrusion is simple enough. The difficulty arises in attempting to apply that principle to the infinite encounters between the individual and agents of that government.

Robbins v. *California, supra,* highlighted the difficulty as it relates to individuals and motor vehicles. The plurality opinion has been characterized as having established a bright line test as to closed, opaque containers. (Concurring opinion of Justice Powell). Justice Blackmun felt that it would be better "to adopt a clear cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* v. *United States* . . . and *Chambers* v. *Maroney*." Justice Rehniquist expressed a similar view. Justice Stevens expressed: "In my opinion, the 'automobile exception' to the warrant requirement therefore provided each officer the authority to make a thorough search of the vehicle — including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain contraband." It was further stated by the dissent (Mr. Justice Stevens) that neither

Chadwick nor *Sanders* were automobile exceptions cases, but that the relationship between the automobile and the article seized was purely coincidental.

In respondent's view the real problem in all of these cases is a reliance on an "automobile exception" rule — a rule which would permit the warrantless search of a motor vehicle regardless of whether the search is conducted at the scene or at another place. *Chambers* v. *Maroney*, *supra*. Perhaps it is *Chambers* that should be reconsidered that there be a reassessment of what *Carroll* v. *United States*, *supra*, really decided.

Carroll, *supra*, involved the warrantless search of an automobile upon probable case that it contained illegal liquor. The principle justification for the warrantless search and seizure as respondent views the opinion was the fact that a motor vehicle had mobility and that exigent circumstances exists justifying the warrantless search. Furthermore, an Act of Congress permitted the seizure of the contraband.

In *Preston* v. *United States*, 376 U.S. 364 (1964), this Court recognized that searches involving vehicles and other movable items were subject to different treatment from searches involving fixed objects like houses. Citing *Carroll*, *supra*. The question was whether the search of the vehicle was unreasonable. An inquiry must be conducted to determine whether the facts of a case were such that the search fell within any of the exceptions to "the Constitutional rule that a search warrant must be had before a search may be made."

Recognizing that warrantless searches and seizures incidental to a lawful arrest are justified, the Court went on to note that "these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

The Court went on to note that the petitioner and his companions had been arrested and taken into custody and the car had been towed to a garage. There was no danger that the arrestees could have used a weapon in the car or could have destroyed evidence of crime.

Dyke v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) involved a search remote in time from arrest. The Court recognized the fact that because of the mobility of vehicles, they may be searched without a warrant "upon facts not justifying a warrant less of a residence or office." Citing *Carroll, supra,* and *Brinegar* v. *United States*, 338 U.S. 160 (1949). The Court pointed out that the officers have "reasonable or probable cause" to believe "that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."

Dyke, supra, recognized the authority of *Preston, supra,* concerning the invalidity of a search conducted "too remote in time or place to (be) incidental to the arrest."

The case of *Chambers* v. *Maroney, supra,* constituted, in respondent's view, a change in the Court direction in the field of warrantless searches of vehicles.

The Court in *Chambers, supra,* sought to distinguish *Preston, supra,* on the grounds that the arrest in that case was for vagrancy and "it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto." In *Dyke, supra,* there was a rejection of the suggestion of probable cause to search the car. Reciting extensively from *Carroll, supra,* and concluding that *Carroll, supra,* held that "a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained . . . an immediate search is constitutionally permissible." The majority con-

cluded: "for constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

The dissent of Mr. Justice Harlan observed that "the 'general requirement that a warrant be obtained' is basic to the Amendment's protection of privacy and 'the burden is on those seeking (an) exemption . . . to show the need for it.'" Such exemptions are searches incident to arrest and the mobility of a vehicle stopped on a highway.

It appears from a reading of *Chambers*, *supra*, that mobility is not the sole criteria for searches of vehicles, but that upon a finding of probable cause, vehicle searches conducted at another place for the safety or the convenience of the officers are permissible even though there was opportunity for the obtaining of a search warrant. The mobility factor pertained not only on the highway, but at the station house, even though conceivably the vehicle could be immobilized until a warrant was obtained. Because vehicles are different from houses, the *Chambers* majority sustained as reasonable the station house search of the vehicle.

It seems to respondent, that the exigent circumstance doctrine permitting warrantless searches in certain limited situations has been held inapplicable to vehicles where the exigency has ceased to exist because of the removal of the vehicle from the highway to a more secure location. The original justification for a warrantless search of a vehicle stopped on the public highway involved a mobility factor which evaporates when the officers have secured complete custody of the vehicle. Such seems to be the import of *Preston*, *supra*. But since *Chambers*, *supra*, no warrant is required for a search of a vehicle at another more secure place. If a vehicle is involved and the officers have

probable cause, the search can be conducted either at the scene of seizure or at a latter time.

Respondent submits that this ruling constituted a departure from what Justice Harian referred to as "the framework of . . . past decisions circumscribing the scope of permissible search without a warrant."

That following *Chambers, supra,* came *Texas* v. *White, supra, Cady* v. *Dombrowski, supra; South Dakota* v. *Opperman, supra* and *Cardwell* v. *Lewis, supra,* wherein another concept of "lesser expectation of privacy in an automobile" evolved.

Respondent contends that "the lesser expectation of privacy" concept is no longer a valid concept and perhaps never was. An automobile is an article of personal property. It is true that it is a means of transportation, but transportation is a necessity for those living outside urban areas who must depend on automobile transportation to carry them to their places of livelihood. Automobiles themselves do become the repository of personal effects. Automobiles for the most part have locks, closed compartments and trunks. That state regulation of motor vehicles is aimed primarily at identification of vehicles by license number and inspection toward regulating the safe operation of vehicles on the highways. This type of regulation does not interfere with those areas of a vehicle wherein a manifestation of privacy might be expected. (trunk, glove compartment, etc.)

In *Cardwell* v. *Lewis, supra,* the Court reiterated that the protection of privacy was the primary object of the Fourth Amendment, and that its purpose was to "shield the citizen from unwarranted intrusions into his privacy." Stating that the Court had recognized a difference between warrantless searches and seizures of automobiles and fixed premises because of the former's mobility, the plurality opinion cited a "lesser expectation of privacy" factor in motor vehicles, but pointed out that

the interior of the vehicle was not involved in the case and recognized a Fourth Amendment protection extending to motor vehicles. In a footnote (note 8) the plurality observed:

> Again we are not confronted with any issues as to the propriety of a search of a car's interior. "Neither *Carroll, supra*, no other cases in this court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Cardwell, of course, involved an examination of the exterior of a vehicle after it had been removed to a police impoundment lot. The plurality held that a warrant was not required, relying on *Chambers, supra*. Justice Powell concurred in the result without addressing the issue.

The dissent recognized the *Carroll* doctrine that a moving vehicle on an open road creates an exigent circumstance situation. However, the dissent felt that *Carroll, supra*, was inapplicable because there was "no reasonable likelihood that the automobile would or could be moved." citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) and *Preston, supra*.

The lesser expectation of privacy concept was confined to the fact that a motor vehicle's function is transportation and that it seldom serves as a repository of personal effects and that it does not escape public scrutiny when it travels in public.

Respondent would contend that although a motor vehicle would not necessarily be a permanent repository of personal effects, personal effects may be placed in an automobile, hidden from public view (like in the trunk or other closed compartments) and that such a manifestation of an expectation of privacy is just as great as when one temporarily places personal effects in a suitcase, footlocker or other luggage container. *United States* v. *Chadwick, supra, Arkansas* v. *Sanders, supra*, dealt directly with the such articles.

As aptly stated in *Coolidge* v. *New Hampshire, supra,* "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . ." at 461. A search of a motor vehicle or automobile constitutes a "substantial invasion of privacy." *United States* v. *Ortiz,* 422 U.S. 891 (1975).

In *South Dakota* v. *Opperman, supra,* the majority of the court upheld a search of a vehicle during a routine inventory conducted of the vehicle which had been impounded for parking violations.

The court categorized the circumstances under which warrantless searches of automobiles could be conducted. First, because of the inherent mobility of automobiles an exigent circumstance permitted the warrantless intrusion. This, of course, was the *Carroll, supra* doctrine. The *Chambers, supra,* extension of *Carroll, supra* permits the warrantless search even where there is no danger of removal from the jurisdiction. The second circumstance involves the concept that there is a lesser expectation of privacy in motor vehicles as stated by the plurality in *Cardwell* v. *Lewis, supra.* The third circumstance is two pronged, as respondent views the decision. The first prong is a public safety consideration referred to by the Court as "community caretaking functions." citing *Cady, supra.* Wherein automobiles are taken into police custody as the result of accidents, to permit the flow of traffic, to preserve evidence, and to remove damaged or disabled vehicles from the thoroughfares. Following the impoundment of a vehicle, a routine inventory is permitted. In this latter instance, the impoundment and the inventory are many times conducted where there is no suspicion of criminal activity other than violations of municipal ordinances pertaining to traffic enforcement. In other instances criminal activity is directly involved. *Cooper* v. *California,* 386 U.S. 58 (1967) (inventory conducted after impoundment under a state forfeiture statute). *Cady* v. *Dombrowski, supra.* (vehicle impounded following owner's arrest for drunk driving

and where owner was incapacitated.); *Harris* v. *United States*, 390 U.S. 234 (1968) (owner arrested for robbery and vehicle impounded as evidence.)

That the opinions in *Cady, supra, Cardwell, supra,* and *Opperman, supra,* were not without dissent indicating that the whole area of searches and seizures involving automobiles has divided this Court as to what is and what is not proper where a warrant was not precured prior to the search.

As respondent reads *Chadwick, supra,* and *Sanders, supra,* there is a distinction between searches of certain items seized from a motor vehicle and the vehicle itself, the rationale being that there is a greater expectation of privacy in certain types of containers (those which are repositories of personal effects) than in a motor vehicle, and that the immobilization of the seized container requires the intervention of a judicial officer and the procurement of a warrant before a search can be conducted.

In *Sanders, supra,* the majority opinion in a concluding footnote further differentiated between containers and vehicles stating that transportation and impoundment of vehicles seized on the highway awaiting the procuring of a warrant might impose severe and impossible burdens on many police departments. (note 14). However, respondent sees no difference between the burdens imposed upon police departments who impound vehicles for the considerations expressed in *Opperman, supra,* and *Cady, supra,* (i.e. to promote safety on the highway or to safeguard private property) and the burden imposed upon the same entities while awaiting the judicial mandate of a search warrant.

Respondent submits that a reading of the foregoing authorities shows that although there has been a consistent adherence to the mandate that warrantless searches are unreasonable, *per se* unless conducted within one of the few, well delineated

exceptions, the division of opinion as to when those exceptions apply, especially where moving vehicles are involved, requires that a workable rule be established which operates within the constitutional mandate of the warrant clause of the Fourth Amendment.

Respondent suggests that the exception to the warrant requirement where movable objects are involved should be based solely upon considerations of the inherent mobility of the object and the exigencies created by that factor. That where the object seized has been immobilized and the danger of flight or the destruction of evidence has been rendered non-existent for all practical purposes, then any search conducted of the object shall be preceded by a warrant issued by a judicial officer. That the foregoing suggested principle should pertain to any movable object when its inherent mobility has evaporated because it has been effectively immobilized. The intervention of a judicial officer preserves and perpetuates the terms of the warrant clause of the Fourth Amendment. It protects the citizen whose property is the subject of search and seizure by interposing the judiciary between he and the executive. It protects the law enforcement officer by interposing between he and the search the sanction of the judiciary. It serves the judicial system by limiting review of a search conducted pursuant to a warrant to the documents in support thereof unless an aggrieved person can satisfy the rigid requirements of *Franks* v. *Delaware*, 438 U.S. 154 (1978). And last, but not least, it fulfills the mandate of the Constitution which is the bedrock of our political and judicial system.

Although it has been stated that suitcases, and the like even though found in automobiles do not involve the "automobile exception" as was stated in *Sanders, supra*, at 442 U.S. 767, the dissenters in *Robbins, supra*, seem to indicate otherwise. (Dissenting Opinions of Mr. Justice Blackmun, Mr. Justice Rehnquist, and Mr. Justice Stevens). As respondent reads their

opinions, the "automobile exception" should include any and all personal property found inside a stopped vehicle.

For the above reasons, respondent reiterates that only the exigent circumstance of inherent mobility should govern the search of movable objects without a warrant under *Carroll, supra,* and that once the exigency no longer exists, because of the immobilization of the object, then the intervention of a warrant is required.

Respondent submits that *Robbins, supra,* was correctly decided and that reconsideration toward achieving a standard suggested by respondent involving movable objects, would in respondent's view be a step toward eliminating the confusion that seems to prevade this entire area.

II
THE FOURTH AMENDMENT PROTECTS CONTAINERS OF THE TYPE FOUND IN THE CIRCUMSTANCES OF THE PRESENT CASE

Respondent believes that the court below correctly concluded that suppression of the paper bag was required by the Fourth Amendment. The decisions by this Court in *Chadwick* and *Sanders, supra,* upon which the circuit court below relied, demonstrate the rationale for such a result. The petitioner proposes in its brief, as it has in prior cases, to radically expand the non-warrant exemptions of the Fourth Amendment and thus drastically limit the protection to all citizens which the Amendment should provide. Respondent believes that such a suggested expansion is neither warranted by the arguments advanced by the petitioner nor in the best interests of a free society.

A. Warrantless Searches Are Per Se Unreasonable

On countless occasions, this Court had decided cases that, "reflect the settled Constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard

individuals from unreasonable government invasions of legitimate privacy interests." *Chadwick, supra*, 433 U.S. at 11. This safeguard manifests itself in the warrant clause of the Amendment. The prominent place that the warrant requirement is given in this Court's decisions is indicative of the "basic Constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government." *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972).

It is because of the critical importance of the warrant that the Court has often concluded that a "search is *per se* unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the warrant clause of the Fourth Amendment." *Robbins* v. *California*, ____ U.S. ____ 69 L.Ed.2d at 748, 101 S. Ct. at 2844 (1981). *See*, e.g. *Katz* v. *United States*, 389 U.S. 347 (1967), *Agnello* v. *United States*, 269 U.S. 20 (1925). Thus, the Amendment requires that normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause. *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979).

The petitioner in its brief attempts to sidestep this fundamental principle by arguing the reasonableness of the present search. However as the circuit decision below correctly observed, the reasonableness of a search in light of the surrounding circumstances does not obviate the need for a warrant. (Appendix p. 20a) Respondent would emphasize that in the ordinary case, a search of private property must be both reasonable and made pursuant to a properly issued search warrant. Mere reasonableness is not a substitute for the judicial warrant required under the Fourth Amendment. *Sanders*, *supra*, 442 U.S. at 758. Thus, the court in *Sanders*, relying upon *Coolidge* v. *New Hampshire*, *supra*, concluded whether or not the search would be reasonable, the warrant requirement operates "as a matter of course." *Id.* at 758.

Beginning with the initial premise that warrantless searches are *per se* unreasonable, respondent recognizes that the warrant requirement does have exceptions. *Chimel* v. *California*, 395 U.S. 752 (1969) (search of area incident to arrest); *Terry* v. *Ohio*, 392 U.S. 1 (1968) (protective pat-down for weapons); *Carroll* v. *United States*, 267 U.S. 132 (1925) (search of automobile). The exceptions, however, are few and carefully delineated. *Katz*, *supra* at 357. Yet it is the presence of that initial premise that results in two predicates applicable to every proposed exception: First they must serve the legitimate needs of law enforcement officers to protect their own well being or preserve evidence from destruction. *United States* v. *United States District Court*, *supra*, at 318. Secondly, because every exception infringes, to some extent, upon the protective reach of the Fourth Amendment, the burden is on those seeking the exemption to demonstrate the need for it. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1952).

Respondent submits that the petitioner has failed to adequately address either of these predicates and thus is unable to establish any new exception to justify the instant search.

B. A Person Who Safeguards His Possessions Is Due The Protection Of The Fourth Amendment

The Petitioner contends in its brief to this Court that the circuit court decision below resulted in a sweeping extension of the warrant requirement. (Petitioner brief at p. 9) This is a result of the government's belief that only unreasonable searches require warrants. Respondent believes that, to the contrary, any person who manifests an intention to safeguard his property is due, with only very limited exceptions, the protection of the Fourth Amendment.

The Respondent in the present case took several steps to manifest his intention of privacy for the paper bag container. First, he utilized a container which was opaque, thus depriving

the general public of any plain view of the contents. Second, the integrity of the container had not been breached by tears, rips or holes. This demonstrated the respondent's intention to utilize a secure container. Thirdly, he had closed the container, once again depriving outside eyes any view of the contents. Finally, he secured the container in the locked trunk of his automobile — thus performing a ritual which countless millions of motorists perform daily — locking valuables in the trunk of a car.

The Court concluded in *Chadwick* that a person who manifested such an expectation that the contents of a container would remain free from public examination is due the protection of the Fourth Amendment. 433 U.S. at 11. It should be noted that although the container in Chadwick was itself locked (as opposed to being within a locked automobile trunk) it clearly did not have the same degree of integrity as in the present case — since it leaked its contents at the San Diego train station in such amounts as to alert drug agents of a possible violator. 433 U.S. at 3. [2]

The protection of the Amendment to the present case was reinforced by *Robbins, supra,* which did not require the container to be either luggage nor locked in order to invoke the warrant requirement. 69 LEd.2d at 748, 101 S. Ct. at 2844. Nor was the suitcase in *Sanders, supra,* locked. 442 U.S. at 755. The reasoning of the Chief Justice in his concurring opinion in *Sanders* establishes the need for Constitutional protection when he wrote that an "owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police." 442 U.S. at 767. While the government argues in its brief that the warrantless search of a container of "one innocent of wrongdoing" would be only a minor gov-

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[2] Another example of sealed containers which were suppressed (plastic bags) despite the fact that some had tears and holes through which marijuana debris and stems protruded can be found in *United States* v. *Rivera,* 654 F.2d 1048 (5th Cir. 1981).

ommental intrusion, (Petitioner's brief at p. 12), the Chief Justice's concurrance in *Sanders* replies that:

> If not carrying contraband, many persons arrested in such circumstances might choose to consent to a search of their luggage to obviate any delay in securing their release. But even if wholly innocent, some persons might well prefer not to have the contents of their luggage exposed in a public place. They may stand on their right to privacy and require a search warrant. The warrant requirement is not so onerous as to command suspension of Fourth Amendment guarantees once the receptacle involved is securely in the control of the police, as it was here after Sanders' arrest.

442 U.S. at 767.

As respondent argues below, the present case does not come within the parameter of the automobile exception to the warrant clause. The search of which the respondent complains is that of the paper bag container, not of the automobile or the locked trunk. Thus, as in *Chadwick* and *Sanders*, it is the container searched, rather than the vehicle which is controlling. 442 U.S. at 767. Certainly the petitioner would not advocate a warrantless search of the paper bag if it were found in a locked closet of the respondent's home. As in the prior cases, the respondent's vehicle is incidental to the search and does not form an integral element. The presence of the automobile does however serve to demonstrate an important aspect of the respondent's intentions — he placed the container in the most secure section of the automobile, outside the reach of even the most curious public view and in a place which is usually immune from any official inspection.[1]

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[1] The usual reasons given for a lesser expectation of privacy in an automobile have yet to be applied to personal property inside a container in a locked trunk. *See Cardwell v. Lewis*, 417 U.S. 583 (1974) (Object of search in plain view); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Regulation of condition and operation of motor vehicles on public streets); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (Periodic official safety inspections).

Thus, by any of the standard measures, the respondent undertook a course of action which identified the container as an item in which he expected a secure privacy interest. The Fourth Amendment demands that he, and all other citizens subsequent to this case, be assured of the protection of that privacy interest.

C. The Present Container Is Worthy Of The Protection Of The Fourth Amendment

The major thrust of the petitioner's argument in its brief to this Court is that the nature of the respondent's container should determine whether or not it deserves protection of the Fourth Amendment. This argument is often times referred to as the "worthy container rule." The *en banc* opinion below considered this argument and rejected its application (Appendix p. 23a - 25a). Respondent believes that such a result is well founded in both law and logic and urges this Court to likewise reject the proposed exception to the warrant requirement.

The crux of petitioner's argument is that the nature of the paper bag container cannot support an expectation of the protection of the Fourth Amendment.[4] The petitioner attempts to draw support for this position from a footnote contained in the *Sanders* opinion. That note observed that "[n]ot all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment." 442 U.S. at 764 n. 13

The circuit court decision below disposed of the government's argument on both practical and philosophical grounds. First it noted that, with limited exceptions, the Fourth Amend-

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[4] Once again the petitioner has adopted the attitude that the subject of a search must justify his reason for Fourth Amendment protection rather than the person conducting the search having to justify the exception to a warrantless search. Respondent suggests that the protection of the Fourth Amendment is a right granted to all of society and it is the person who proposes to limit that right who must justify his action as an exception to that protection.

ment applies to all personal items. Absent any of those exceptions, an issue addressed by respondent below, a warrant is required. There is no recognized exception for a warrantless search of a closed paper bag. The circuit court declined the government's invitation to create a new exception to the Fourth Amendment for such containers. The government now advances that same proposition to this Court in the hope of carving out of the warrant requirement a new "paper bag" exception.

The underlying basis for such a proposition is singular — some containers do not merit Fourth Amendment protection and a paper bag is in such a category. However neither case law nor practical realities support such a theory. The current test for the need for a warrant can be found in the *Sanders* opinion. Some containers do not merit Fourth Amendment protection because their contents can be inferred from their outward appearance. Other containers will expose their contents to plain view. 442 U.S. at 765 In either case, the container does not merit protection of a warrant because its condition manifests no indicia of the owner's desire to retain a privacy interest in the contents. The present container, irrespective of its construction, clearly implies an expectation of privacy. The contents were not open to plain view. (Appendix p. 26a) Nor did the appearance or feel of the paper bag imply its contents (Appendix 25a). To suggest, as the petitioner now does, that the container is void of any Fourth Amendment protection solely because it is constructed of paper is to ignore the realities of everyday life.[5]

Certainly the petitioner would not advocate that letters could be read by government agents without a warrant because they

[5] See for example, *United States* v. *Dien*, 609 F.2d 1038 (2nd Cir. 1979) affm'd on rehearing 615 F.2d 10 (1980). In *Dien*, although the cardboard boxes were taped closed they failed to contain the odor of marijuana. Despite this lack of integrity as to their contents the Third Circuit found sufficient indicia of privacy solely because they were placed in the cargo section of a van, the inside of which could not be viewed from the street. *Id.* at 1045

are enclosed only in paper envelopes. This Court has ruled that, absent a warrant, only outward inspection of form and weight are permitted whenever papers are "closed against inspection wherever they may be." *Chadwick* 433 U.S. at 10, citing *Ex Parte Jackson*, 96 U.S. 727 (1878). The petitioner advances no reason why a paper envelope that does not disclose its contents should be treated with any more respect than a paper bag which reveals nothing of its contents. Respondent suggests that on the facts of the present case, there can be no distinction. [6]

The second reason for which the court below rejected the petitioner's suggestion for a paper bag exception was a practical one. Observing that the Fourth Amendment must speak to the officers on the street in an intelligent manner (App. p. 23a), the court concluded that any "unworthy container" rule would be unworkable. Since the "worth" of any container for Fourth Amendment purposes would have a near infinite set of values depending on time, place, circumstance and person, any test for "worth" would be ineffective in the courthouse and unusable in daily street encounters by police. The attributes of various containers listed in the court's opinion (App. 24a) demonstrate the folly of a "worthy container" rule. *See also, United States* v. *Moschetta*, 646 F.2d 955 (5th Cir. 1981) *cert.* pending.

Petitioner suggests no substitute for the container test of *Sanders* noted above. Rather, the petitioner seeks to remove any ambiguities by limiting the protection of the warrant clause only to luggage [7] and expand the recognized exceptions to cover

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[6] Petitioner makes much of the fact that a paper container may reveal its contents due to spillage, handling or the passage of time. (Petitioner's brief at p. 34) The speculative nature of this argument is highlighted by the fact that none of these possibilities were present in the instant case. Moreover many containers which the petitioner views as more substantial would be subject to the same caveat i.e. a piece of luggage which springs open spilling its contents when it is accidently dropped or mishandled.

[7] Of course, even luggage may be searched without a warrant if exigent circumstances are present. See, *United States* v. *Kreimes*, 649 F.2d 1185, 1190-91 (5th Cir. 1981).

all other containers.[*] Clearly, the Fourth Amendment does not limit its protection only to luggage, as demonstrated by the Court's opinion in *Robbins, supra*. Respondent suggests that the circuit court's resolution of ambiguities is the more sound alternative since it is the only method by which the full protection of the warrant clause can be obtained.

Moreover, the decision has a solid basis in prior decisions by this Court. In articulating a standard which is equally applicable to the container in the present case, the Court concluded in 1967 that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See, Lewis* v. *United States*, 385 U.S. 206, 210; *United States* v. *Lee*, 274 U.S. 559, 563 But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *See, Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727.

Katz v. *United States*,
389 U.S. 347, 351-352 (1967)

Petitioner raises an additional argument in this area to which respondent would reply. Petitioner urges that paper containers are used "simply to facilitate the movement of merchandise, or to contain bulk items," and thus not repositories of personal effects thereby meriting less Fourth Amendment protection. (Brief at p. 35) Initially, respondent notes that the Fourth Amendment protects a person, his house, papers and effects from unreasonable searches and seizures. There is no exception to the warrant requirement which permits warrantless searches simply because the personal effects may be in "bulk" or may be

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[*] As to what some courts have viewed as luggage see generally, *United States* v. *Rigales*, 630 F.2d 364 (5th Cir. 1980) (leather case); *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979) (knapsack) See also, *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir. 1981) Tamm dissent at p. 1174 n.3

classified as "merchandise." By painting such an impersonal relationship with the container, the petitioner apparently hopes to refute the circuit court's conclusion that paper bags do often contain very personal property. (App. 24a, n. 30) Moreover the argument is refuted by the petitioner's brief itself later when it admits (as it must) that a "common grocery bag or a similar container may at times be pressed into service as a repository of personal effects." (Brief at p. 36) The petitioner's answer to such a fact of daily life is to counter that the "theoretical possibility of such a typical use" does not justify Fourth Amendment protection. The reply however, ignores one of the very reasons that the circuit court rejected the same argument below — "It would snare those without the means or the sophistication to use worthy containers." (App. p. 24a) By suggesting that this court resolve any difficulties in interpretation against the protection of the Fourth Amendment the petitioner has once again, run roughshod over the guiding principles of the Amendment.

In evaluating the present container's indicia of privacy, a comparison with past cases may be instructive. In *Katz, supra,* the Court held in favor of warrant when the person performed the simple act of closing a glass telephone booth door and inserting a coin into the telephone coin box. 389 U.S. at 352 The present respondent undertook actions that are of no lesser significance than Mr. Katz to demonstrate his expectation of privacy. The presence of a securing device such as a lock is no talisman of privacy for warrant purposes as demonstrated by *Robbins, supra*. In like fashion, containers of far less integrity have been protected by the warrant requirement. *Chadwick, supra*.

Petitioner's insistence that a paper container may be elevated from its "low-privacy uses" only by additional significant actions (Petitioner's brief at p. 37) indicates that petitioner has missed the point of the Fourth Amendment. To award Fourth

Amendment protection *only* when someone has marked his container "private-do not open" or secreted the container behind a plywood wall, (Petitioner's brief at p. 37 n. 21) is to impermissably shift the burden of protection and denigrates the importance of the rights involved.

Nor do the cases cited by the petitioner from the Courts of Appeal support such a proposition. Those cases either fit within the rationale of *New York* v. *Belton*, ____ U.S. ____ , 69 LEd.2d 768, 101 S.Ct. 2860 (1981), or rely upon true exigent circumstances (i.e. unauthorized removal or destruction of evidence). Thus, the decisions do not turn upon the fact that the containers were constructed of paper. For example, the petitioner refers to the following cases in its brief:

Government of the Virgin Islands v. *Rasool*, 657 F.2d 582 (3rd Cir. 1981) Search of a paper bag found in the *passenger compartment* within reach of the driver or passenger approved under the *Belton* rationale.

United States v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) A case which permitted the warrantless search of a paper bag found *underneath the driver's seat* of the vehicle. *Id.* at 685

United States v. *Mannino*, 635 F.2d 110 (3rd Cir. 1981) A paper bag within a plastic bag was held admissable without a warrant because it was found on the *front seat* of the defendant's automobile, *Id* at 112; a crowd gathered at the time of the arrest which posed a threat to the security of the vehicle and its contents, *Id* at 115; and the shape and weight of the bag indicated the presence of weapons. *Id* at 112.

United States v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) Permitted the warrantless search of a grocery bag taken from a defendant who was arrested as he walked through a Safeway store parking lot. The search was upheld as one incident to arrest but the court refused to consider the expectation of privacy argument since it had not been advanced at the District Court. *Id.* at 1338.

United States v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) Approved the warrantless search of evidence found in a paper bag in a trunk. The court found that because the defendant was not the owner of the vehicle nor made any claim to the trunk's contents, he could not claim any expectation of privacy to justify warrant protection. The court remanded the case to the District Court to allow the defendant to make such a showing. *Id.* at 701.

United States v. *Portillo*, 633 F.2d 1313 (9th Cir. 1980) The court permitted a warrantless search of two paper bags in a vehicle trunk because the officer making an inspection of the vehicle pursuant to a highway safety stop concluded *without opening the bags* that they contained weapons. *Id.* at 1315-16.

United States v. *Markland*, 635 F.2d 174 (2nd Cir. 1980) The court approved a warrantless search of a "plastic, zippered beverage container bearing a 'Schlitz' beer logo" because it was scattered on the ground due to a highway accident involving the defendant. The court permitted the officer to inspect the contents of the container as a protective measure before he placed the item in his patrol car. *Id.* at 176.

United States v. *Bush*, 647 F.2d 357 (3rd Cir. 1981) Allowed search and seizure of items found in a card board box in a vehicle trunk because the top was off the box and the *contents were exposed* to plain view. *Id.* at 371.

United States v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) Allowed search of a paper bag found in plain view within the *passenger compartment* of a vehicle when that bag displayed its contents by reason of its obvious markings (pharmacy bag). *Id.* at 99-100.

United States v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) Permitted warrantless search of automobile trunk because the stop took place during rush hour traffic on a very busy thoroughfare and thus, there was "a very real danger that any stolen goods being transported in the automobile would be secreted or

melted down." *Id.* at 1210. Neither the automobile nor the defendant were taken into custody. *Id.* at 1209.

Finally, while admitting that protected expectations may exist at times in paper bags, the government concludes that because such use will only occur occasionally that full protection is not warranted. (Brief at p. 36) Such a position does a disservice to the words used in *Sanders* 442 U.S. at 762. The Fifth Circuit properly replied to such a position when it wrote: "The government argues that paper bags, and the like, are neither common respositories nor inevitably associated with expectations of privacy. But this is to make an absolute out of mere descriptors and to narrowly construe Fourth Amendment protections, rather than exceptions. Such reasoning would place an entire body of law upon its head." *United States* v. *Moschetta, supra,* at 961.

Moreover the very language upon which the petitioner attempts to base its argument serves to demonstrate the bankruptcy of its position. The footnote in *Sanders* upon which the government relies does not establish an "unworthy container" rule based on construction of the container — as the petitioner repeatedly suggests. Rather it clearly and without reservation tells the lower courts that those containers that do not deserve Fourth Amendment protection are those whose contents can be inferred from their outward appearance or those that expose their contents to plain view. 442 U.S. at 764 n. 13 This straight forward approach resolves most of the "possibilities" raised by petitioner in considering the various conditions of a paper container. [9] Significantly, the petitioner makes no claim that the container in the present case fell within either of the Sanders "unworthy" criteria. The fact that such a container may, in

[9] The test of *Sanders* for container protection, while not settling all possible disputes, does serve as a workable yardstick for the lower courts. *See, United States* v. *Pillo,* 522 F. Supp. 855 (M.D.Pa. 1981) (Suppression of a tupperware-type container discovered in a trunk)

some future search and seizure, satisfy the criteria does not in any way justify the conclusions that warrant protection must be withdrawn in the present case.

D. Exceptions To The Warrant Requirement Must Be Few And Rigorously Circumscribed

In considering the critical importance of the rights protected by the Fourth Amendment, Mr. Justice Jackson wrote in 1949 that:

> "These (Fourth Amendment rights), I protest are not mere second class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.
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> *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson J. Dissenting)

Over and again this Court has emphasized that the mandate of the Fourth Amendment requires the adherence of police officers to the judicial process. *United States* v. *Jeffers*, *supra* at 51. Moreover the decisions of this Court have repeatedly held that searches conducted outside the judicial process, that is without prior approval by a judge or magistrate, are *per se* unreasonable. In *Jones* v. *United States*, 357 U.S. 493, (1958) the Court cautioned that any exceptions to the "rule that a search must rest upon a search warrant have been jealously and carefully drawn . . . " Id. at 357. The principle that any exceptions must be few and rigorously circumscribed is one of the most often repeated rubrics of Fourth Amendment decisions. *Robbins*, *supra*, 69 LE.d2 at 749; 101 S. Ct. at 2844; *Sanders*, *supra*, at 759; *United States* v. *United States District Court*, *supra*, at 318.

The exceptions which have been recognized have been required because they serve the legitimate needs of law enforce-

ment officers to protect their own well being and preserve evidence from destruction. *Id.*, at 318. The present search however, refutes any suggestion that either of the accepted reasons may serve as a basis for the instant search. In the present case, the respondent was arrested and completely controlled by the authorities. Likewise the vehicle was in the total control of the police. There was no danger of destruction of evidence; removal from police custody; or danger to the officers.

An examination of the present facts, in light of the recognized exceptions, demonstrates how far this case differs from previous exigent circumstances. Clearly the search and seizure were not performed for the arresting officers' safety. *Terry* v. *Ohio, supra*. The petitioner makes no suggestion that this is a *Terry* type search. Nor was this a search and seizure of the person incident to a lawful arrest. *United States* v. *Robinson*, 414 U.S. 218 (1973) *Robinson* permitted the search only of the person and the present search was of an automobile trunk. In addition it cannot be argued that the search was permissable under the exception of *Chimel* v. *California, supra*, since the bag in question was far beyond the respondent's control. Finally it cannot be successfully argued that the action was part of an inventory search since the police officers who conducted the search and seizure indicated that they took the car to the stationhouse for the specific purpose of seizing the bag in the trunk (H. Tr. p. 67). Thus the action is not an inventory search as defined by this Court. *Cooper* v. *California*, 386 U.S. 58 (1967). Nor does the present search come within the plain view exception since there is no contention that the bag displayed its contents by its outward appearance. *Harris* v. *United States*, 390 U.S. 234 (1968). [10] Finally, the instant facts do not satisfy the "hot

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[10] Two other exceptions to the warrant requirement, border searches *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) and administrative searches, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) have no applicability to the present situation.

pursuit" exception — for the vehicle was in the control of the police. *Warden* v. *Hayden*, 387 U.S. 294 (1967)

The only remaining exception to the warrant requirement, the automobile exception, *Carroll, supra;* does not, as respondent has argued before, apply to the present case since it was the container within the trunk that was searched without a warrant. The rule announced in the *Belton-Robbins* decisions is clear: A warrantless search of the passenger compartment is permissable at the time of arrest while a search of a non-accesible area (trunk) requires a warrant. [11] However even if this Court elects to expand the exception to all containers within a car, the extension of the automobile exception to the present search is justified neither by the original reasoning of the exception nor by the logic of the Fourth Amendment. *Carroll* based its reasoning on mobility of the vehicle — a factor not involved in the present case.

It is an axiom of Fourth Amendment law that the burden is on those seeking the exemption to show the need for it.

While the automobile exception has been extended to cases that do not strictly involve mobility problems. *Chambers, supra,* [12] the expansion of the exception beyond the true

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[11] A demonstration of the applicability of the rule can be found in *United States* v. *Russell*, 655 F.2d 1261, (D.C. Cir. 1981) (vacated January 22, 1982); in which the Court of Appeals originally suppressed a paper bag found by police in the hatchback portion of an automobile. 655 F.2d at 1264. In light of *Belton* and *Robbins* the panel on rehearing reversed itself and allowed admission of the evidence.

[12] In permitting such a warrantless search in *Chambers*, the Court did note that, "it was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and safety of his car to have the vehicle and the keys together at the station house. *Chambers, supra,* p. 52 n.10.

rationale of the exigent circumstances doctrine has never been firmly established. Chambers for example, calls its own conclusion on the permissability of a station house a "debatable question" that "arguably" could go either way and "may depend on a variety of circumstances." *Id.* at 51-52[13] *United States* v. *Jeffers, supra* at 51. Furthermore each exception must be limited to that which is necessary to accommodate the identified needs of law enforcement *Mincey* v. *Arizona,* 437 U.S. 385 (1978).

The petitioner's arguments on the burdens imposed by the warrant requirement in this case were answered by this Court's decisions in *Chadwick, supra, Sanders, supra,* and *Robbins, supra.* As the Court concluded in *Mincey* v. *Arizona:*

> Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge* v. *New Hampshire, supra,* at 481, 29 L Ed 2d 564, 91 S Ct 2022. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, supra,
437 U.S. at 393

The search in the present case is unable to satisfy the requirements of any of the recognized exceptions to the warrant requirement. The petitioner proposes to either stretch a current

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[13] A number of commentators have likewise agreed that an expansion of the automobile exception is without foundation. *See,* e.g. *Supreme Court 1980 term,* 95 Harv. L. Rev. 91, 261 (1980); Wilson, *the Warrantless Searches: Exception without Justification,* 32 Hastings L. J. 127, 130-132, 158-59 (1980); Note, *Warrantless Searches and Seizures of Automobiles,* 87 Harv. L. Rev. 835, 845 (1974).

exception or to create a whole new one. In either case, the petitioner has failed to identify the exigent circumstances that previous exceptions have required. Mere expediency or convenience has never been an acceptable reason to disregard the requirements of the Fourth Amendment. To permit such reasons to serve as the basis for another exception is to do an extreme disservice to prior decisions of this Court and render meaningless the warrant provision of the Fourth Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-2209

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ROSS, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our opening brief we set forth two independent grounds for sustaining the search of respondent's paper bag, lawfully seized from the trunk of his car based upon probable cause to believe that it contained heroin. First, we argue (Br. 14-41) that procurement of a warrant is not a precondition to a reasonable search when police have lawfully seized a container that is not conventionally associated with substantial privacy interests and possess probable cause to believe that it contains contraband or evidence of a crime. Second, we contend that, whatever the rule may be in other settings, application of the warrant requirement to a search of a container found during a probable cause search of an automobile is unjustified. Neither respondent nor amicus curiae American Civil Liberties Union (ACLU) has come to grips with the fundamental principles of Fourth Amendment jurisprudence that underlie each of our arguments. We accordingly note only a few salient points in reply.

1. In response to our attempt to examine the issue on the basis of the policies underlying this Court's decisions regarding the applicability of a warrant requirement to various types of searches, respondent and amicus ACLU simply assert that "warrantless searches are *per se* unreasonable" (Resp. Br. 23; see ACLU Br. 14-15). Amicus ACLU urges that our argument, which looks toward the nature of the privacy interest at stake and the benefits to be derived from insistence upon the warrant procedure, would create an exception to a warrant requirement finding "no support in either the language of the Fourth Amendment or any interpretation of that Amendment made by this Court" (Br. 38). These contentions stand the matter upon its head. As noted in our opening brief (at 14-15 n.6), the bare language of the Fourth Amendment imposes no requirement of recourse to warrants whatsoever. This Court, to be sure, has held that in order to meet the test of reasonableness laid down by the Fourth Amendment, "normally searches of private property [must] be performed pursuant to a search warrant * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). But the Court has been equally firm pointing out that exceptions are fashioned to this general presumption where "the societal costs of obtaining a warrant * * * outweigh the reasons for prior recourse to a neutral magistrate." *Id.* at 759.

We have accordingly attempted to argue the issue in terms of whether the benefits of applying a warrant requirement to probable cause searches of containers having relatively low privacy attributes are in general likely to outweigh the social and individual costs of such a requirement. Thus, we have carefully analyzed the benefits generally derived from warrants, and shown that they are greatly attenuated in the context of a search of a seized container such as respondent's paper bag (Br. 21-24, 29, 43). At the same time, we have contended (Br. 25-28, 43-46) that the

imposition of a warrant requirement has substantial costs that, while well justified in other contexts, outweigh the benefits in this context; in this connection, we have noted the special costs to other Fourth Amendment interests of the container's owner flowing from a warrant requirement for container searches (Br. 25-28).

Neither respondent nor amicus has elected to join issue with us on a functional analysis of the costs and benefits of a warrant requirement for this type of case. Respondent simply does not address the question whether a warrant requirement serves its usual purpose in this setting. The ACLU is similarly silent as to the applicability of most of the justifications usually cited in support of the warrant requirement, dismissing our contentions as irrelevant "policy considerations" (Br. 46 n.38). But it is the policy of the Fourth Amendment itself that is at issue here.[1]

2. In our second argument we note (Br. 42-43) that because the policy of the Fourth Amendment does not require a warrant when a vehicle is searched upon probable cause pertaining to the vehicle, there is no justification for limiting the search more strictly than if it were conducted pursuant to a warrant authorizing a search of the vehicle. Perhaps in recognition of the odd result fostered by the decision of the court of appeals, respondent's answer to our contention is the suggestion (Br. 6-7, 13-21) that the

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[1]The amicus curiae does insist that even in the setting of this case, a warrant serves to establish "the particularity of the search to be conducted" (Br. 30), adding "[t]here is no more justification to permit wholly unparticularized and general searches of automobile trunks than of any other area" (*ibid.*). This argument is misconceived, for at the point at which a warrant to search respondent's bag could have been sought, a "general" search of the automobile trunk had already been lawfully completed and the focus of interest had narrowed to the bag. Unless *Carroll* v. *United States*, 267 U.S. 132 (1925), is to be overruled, a warrant requirement simply does not serve to confine the search in the manner suggested.

Court overrule *Chambers* v. *Maroney*, 399 U.S. 42 (1970), and limit the automobile search exception to exigent circumstances created by the mobility of an unsecured automobile on the highway. We do not essay here to defend the automobile search doctrine repeatedly endorsed by the Court.[2] We do observe, however, that respondent's proposed modification of the automobile search rule would not aid him, for the search of his bag was completed while his car was parked on a public street rather than while the car was in secure police custody, as was the case in *Chambers*. Thus, unless one assumes that the act of seizing a vehicle itself eliminates the basis for a search—a proposition analogous to that rejected in *New York* v. *Belton*, No. 80-328 (July 1, 1981), slip op. 7 n.5—respondent's contention is unavailing.[3]

3. The ACLU suggests (Br. 6 & n.3, 47 n.39) that our failure to challenge the court of appeals' suppression of the contents of respondent's leather pouch reveals some defect

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[2]See, *e.g.*, *Colorado* v. *Bannister*, 449 U.S. 1 (1980); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 760; *United States* v. *Chadwick*, 433 U.S. 1, 12-13 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367 (1976); *Texas* v. *White*, 423 U.S. 67 (1975); *Cardwell* v. *Lewis*, 417 U.S. 583, 589 (1974); *Cady* v. *Dombrowski*, 413 U.S. 433, 439-440 (1973); *Cooper* v. *California*, 386 U.S. 58 (1967).

[3]We do not understand respondent's assertion (Br. 8) that "the present case involves a warrantless seizure of an automobile for the sole purpose of transporting it to the station house for the warrantless seizure of a paper bag" or the conclusion drawn (*ibid.*) that "the automobile exception * * * cannot apply" to such an automobile. It is undisputed that respondent's paper bag was discovered in the course of a lawful on-the-spot search of his automobile, and that the bag, too, was searched on the spot, at which time the heroin contained within was discovered (H. Tr. 66-67). The officers then replaced the bag and its contents in respondent's trunk, transported the vehicle to a police station, and there removed the heroin from the bag and completed a search of the car (*ibid.*). These facts in no way undercut the validity of the initial search of the bag or sever the connection between that search and the search of respondent's car.

or inconsistency in our analysis. That suggestion is unfounded. The reason we did not challenge the ruling below regarding the pouch was that upon rehearing in the court of appeals the government conceded that suppression of the pouch was proper (Pet. App. 15a). We accordingly deemed it inappropriate to challenge that aspect of the decision below in our petition. See *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). It is perfectly true, however, that adoption of our automobile search analysis would in all likelihood validate the search of containers such as respondent's pouch.[4] Contrary to the ACLU's contention (Br. 27, 47 n.39), however, that result is not irreconcilable with *Sanders* and *Chadwick*, for those cases did not involve searches of a container occurring in the course of an automobile search based upon probable cause extending to the automobile itself. See *Robbins* v. *California*, No. 80-148 (July 1, 1981), slip op. 7 (Powell, J. concurring); *id.* at 1-2 (Blackmun, J., dissenting); *id.* at 3-7 (Rehnquist, J., dissenting); *id.* at 1-3, 5-6 (Stevens, J., dissenting); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 767-768 (Burger, C.J., concurring in the judgment); *id.* at 772 (Blackmun, J., dissenting).[5]

4. Because mail is often wrapped in a paper container—an envelope—respondent suggests (Br. 27-28) that our argument respecting low privacy containers is irreconcilable with the rule of *Ex parte Jackson*, 96 U.S. 727, 733

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[4]Should this Court reverse on an analysis suggesting that the pouch was properly admitted in evidence, the court of appeals would then be free to decide on remand whether to reconsider its holding with respect to the pouch.

[5]Contrary to the ACLU's assumption (Br. 18), the relationship between respondent's automobile trunk and his heroin was far from casual or temporary. The officers who stopped respondent had reliable information that respondent was selling narcotics from the automobile trunk (H. Tr. 4). Their suspicion did not focus on the paper bag until it was discovered in searching the trunk.

(1878), that mail is generally cloaked with the protection of a warrant requirement. Respondent misconceives our argument. We do not question the decision in *Ex parte Jackson*, and we have no doubt that features of a package or container other than physical durability may provide the objective indicia that the container is vested with privacy attributes of such a magnitude that a warrant is needed to protect against the costs of an unreasonable search. The special function of mail as an organ of communication as well as commerce, together with the laws which protect the sanctity of the mails, establish the legitimacy and socially recognized substantiality of the expectation of privacy for mail. See *Walter* v. *United States*, 447 U.S. 649, 655 (1980) (opinion of Stevens, J.); 18 U.S.C. 1700-1710. Respondent's unsealed lunch bag, however, had no attributes, structural or otherwise, that could support a substantial expectation of continued privacy after it came lawfully into the hands of police officers.

5. The ACLU suggests (Br. 58) that the analysis we employ to distinguish containers that may reasonably be searched without a warrant from more private containers such as luggage "requires inquiry into the accused's subjective intent." This suggestion reflects a serious misunderstanding of our submission. Consistent with *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), the focus of our analysis is upon the reasonableness and socially recognized substantiality of an expectation of privacy, rather than upon its mere existence. Toward that end it is appropriate to consider not only the physical properties of the container chosen by an individual, but any other conduct or circumstance that *objectively* manifests the owner's expectation of privacy.

Rather than the government, it is the amicus curiae that focuses improperly (Br. 49, 60) upon the subjective privacy expectations of an individual, branding as unreasonable any warrantless search unless the owner "knowingly

exposes [his property] to the public." The suggested exception is too narrow. Indeed, it is no exception at all, for when items are exposed to public view, their examination simply does not entail any "search" within the purview of the Fourth Amendment. The ACLU's formulation thus would effectively eliminate all consideration of the reasonableness of a claim of privacy from the Fourth Amendment calculus. In fact, by choosing a container not calculated to maintain privacy after it has left his hands, an individual objectively manifests the absence of reasonable expectation of substantial privacy. Because any purely private expectation to the contrary is necessarily unknown to the police, it should not receive any consideration in determining the reasonableness of a search under the Fourth Amendment.

6. Respondent (Br. 28) and the ACLU (Br. 56) both assert that insurmountable problems of administration will arise unless the warrant requirement is extended to all containers, of whatever description, without regard to the presence or absence of any legitimate expectation of substantial privacy maintained therein. This prediction is substantially undercut, however, by the striking uniformity with which the courts of appeals have distinguished between luggage and its functional equivalents on the one hand and paper and plastic bags on the other (see cases cited in our opening brief at 31-32 & nn.17-18).[6] And neither respondent nor amicus makes any effort to delimit the scope of the

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[6]Contrary to respondent's assertion (Br. 31-32), the courts of appeals' decisions we have cited (Br. 31-33 & n.18) generally rest upon consideration of the individual's expectation of privacy rather than a search-incident-to-arrest rationale or true exigent circumstances. It may well be that after *New York* v. *Belton*, *supra*, the result in some of these cases could be justified on an alternative ground. That possibility, however, has no bearing upon the relevant point: the ability of the courts of appeals to achieve a high degree of consistency in cases presenting the question whether a warrant is required. And in the aftermath of *Belton*, the courts of appeals continue to draw the distinction we have noted. See, *e.g.*, *United States* v. *Marin*, Nos. 81-1300 &

sweeping doctrine enunciated by the court of appeals, by explaining how "containers" would be defined for the purpose of that rule. Thus, rather than eliminate the problem of determining when a warrant is required, the decision below merely shifts the locus of uncertainty.[7] In sum, it may be that a degree of uncertainty would attend any rule governing the circumstances in which warrants are required, but there is little practical difference in this regard between the rule for which we contend and that adopted by the court of appeals; practical considerations accordingly cannot justify abandoning an analysis that turns upon the pertinent Fourth Amendment policies.

CONCLUSION

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1982

81-1301 (2d Cir. Jan. 18, 1982), slip op. 853-854; *United States* v. *Weber*, Nos. 80-1533 *et al.* (1st Cir. Dec. 28, 1981), slip op. 5-6 (on petition for rehearing; see note 7, *infra*).

[7]As noted in our opening brief (at 39), in *United States* v. *Weber*, 664 F. 2d 841 (1981), the First Circuit held that a warrant was required to unroll a rolled up raincoat seized by law enforcement authorities. Upon consideration of the government's petition for rehearing, the court adhered to the view that *Robbins* v. *California* requires that result, but concluded that the law of the First Circuit had been to the contrary prior to *Robbins*, and accordingly declined to give retroactive effect to its interpretation of *Robbins*. *United States* v. *Weber*, Nos. 80-1533, *et al.* (Dec. 28, 1981).

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No. 80-2209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERT ROSS, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*, IN SUPPORT OF RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, AMICI CURIAE, IN SUPPORT OF RESPONDENT

QUESTIONS PRESENTED

1. Whether the Court should expand the narrow exception to the Warrant Clause for automobile searches to permit warrantless searches of every container

found in the trunk of an automobile that has been seized upon probable cause.

2. Whether the Court should create a new exception to the Fourth Amendment to strip "unworthy" containers of Warrant Clause protection.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a non-partisan, non-profit membership organization which for more than sixty years has been dedicated to the protection of personal liberty through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The American Civil Liberties Union Fund of the National Capital Area (Fund) is the Washington, D.C. area litigation arm of the ACLU. ACLU and Fund have frequently appeared in this Court and in other courts, as counsel for the parties and as amici, in

Fourth Amendment cases. E.g., Terry v. Ohio, 392 U.S. 1 (1968); Michigan v. Summers, 101 S. Ct. 2587 (1981).

This case presents two major Fourth Amendment questions of critical import to those concerned with civil liberties. First, the United States has argued that several decisions of this Court should be overruled, so that, if probable cause exists to seize a motor vehicle, a general warrantless search of the vehicle and every container found therein would become permissible. The government also has argued that the Court should declare that individuals have no reasonable expectation of privacy in a broad range of bags, parcels and containers commonly used in everyday life to transport or store possessions. If that rule were adopted, those containers would become subject to warrantless searches wherever found --

whether in the home, the car, or on a person's arm on a public street. We have submitted this Brief because of our view that the impact of the government's proposed reductions in Fourth Amendment protections would significantly and adversely affect the liberties of all law-abiding persons.[1/]

STATEMENT

This case involves the constitutionality of a warrantless search of a closed paper bag, found in the locked trunk of a motor vehicle after the vehicle had been stopped and seized, and its driver arrested, on the basis of probable cause to believe the trunk of the car contained contraband. In its order granting certiorari, the Court asked the parties to

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1/ Letters of consent from the parties to the filing of this brief have been lodged with the Clerk of the Court.

address the question whether it should reconsider its decision in Robbins v. California, 453 U.S. ___, 101 S. Ct. 2841 (1981) (hereinafter "Robbins"). There, the plurality opinion held that a warrant was required to search any container outside the passenger compartment of a motor vehicle during a warrantless search based upon probable cause, unless the characteristics of the container caused its contents to be obvious to an observer. We respectfully submit that Robbins was correctly decided and that, to the extent it is reconsidered in this case, its holding should not be disturbed.

We will not repeat the parties' description of the facts and the procedural posture of the case. We wish to note, however, that two issues litigated below are not before the Court on the government's petition for certiorari:

(1) The government has not raised in this Court the question whether Arkansas v. Sanders, 442 U.S. 753 (1979) (hereinafter "Sanders"), applies retroactively.[2/] (2) The government conceded below that the warrantless search of a zippered red leather pouch found alongside the paper bag in the trunk of respondent's automobile was unlawful under Sanders, and the lawfulness of that search is not at issue here.[3/]

SUMMARY OF ARGUMENT

The Court's request that the parties address the question whether Robbins should be reconsidered has led the government to

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2/ Petition of the United States for Certiorari at 5 n.1 & 8 n.7; Brief of the United States (hereinafter "Gov't Brief") at 5 n.2.

3/ Gov't Brief at 5 n.2. See United States v. Ross, 655 F.2d 1159, 1161 & n.3 (D.C. Cir. 1981) (en banc). In consequence, respondent's conviction will be reversed whatever the outcome of this proceeding.

advocate two overbroad and constitutionally unjustified positions.

Its most extreme suggestion is to urge a dramatic expansion of the so-called "automobile exception" to the Warrant Clause of the Fourth Amendment. The government argues that the Warrant Clause should not apply at all to an automobile or its contents if a law enforcement officer has probable cause to believe it contains evidence of a crime.[4/] It urges this Court to establish a per se rule that any container found in an automobile in such circumstances may therefore be searched without a warrant -- no matter what the nature of its construction or its likely contents, and even though the vehicle and its occupants have been secured.

4/ Gov't Brief at 41-47.

We believe the government's "automobile trunk exception" argument is wholly inconsistent with a series of recent Fourth Amendment decisions -- most particularly United States v. Chadwick, 433 U.S. 1 (1977) (hereinafter "Chadwick"), Sanders, and Robbins. Those decisions are sound law and should be reaffirmed. The government has advanced no rationale to support its view that reasonable expectations of privacy are abandoned when containers are placed in locked motor vehicle trunks. It has also failed to articulate any compelling need to justify creating a new exception to the Warrant Clause. It simply reiterates the constitutionally insufficient notion that law enforcement would be streamlined if there were no warrant requirement.

Alternatively, the government urges adoption of a new Warrant Clause exception

for certain types of containers which, in its view, are unworthy of protection against warrantless intrusion. The government recognizes that this rule would be more difficult for the police and the courts to comprehend or administer than the rule set forth in Robbins. Yet it argues that the Court should embark on a course of providing or withholding constitutional protection to a wide variety of receptacles commonly used to transport possessions, depending upon such ambiguous considerations as whether or not they are "conventionally regarded as embodying a substantial privacy interest"; are the "functional equivalent of luggage"; contain "personal" or "impersonal" matter; or display indicia of a subjective desire on the part of their owner to conceal their contents. Gov't Brief at 14, 27-28, 31.

The government's "unworthy" container argument is unmeritorious as a matter of constitutional law. A broad variety of "non-traditional" containers, including paper bags, plastic bags, and tote bags, are commonly used and transported by the public with full and reasonable expectations that they will remain free from warrantless governmental intrusion. The notion that the Fourth Amendment protects only certain conventionally approved, rigid containers or those located in certain places is simply wrong. Such a rule will necessarily lead, as the government concedes,[5/] to a new wave of Warrant Clause litigation. Furthermore, law enforcement officers considering whether they must obtain a warrant before searching a container will be unable to derive any meaningful guidance from the

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5/ See Gov't Brief at 40-41.

mystifying tests the government regards as relevant.

We believe that Robbins and the Court of Appeals' decision below were correct. The Court should state plainly that warrantless intrusions into containers in locked automobile trunks are unlawful. If this is made explicit, the police routinely will take the ministerial and nonburdensome steps necessary to obtain warrants, and no law enforcement interest will suffer as a consequence. Rather, this salutary development will allow law enforcement authorities to avoid the loss of cases that should have been won and reduce the interminable litigation in this area.

ARGUMENT

I. CONTAINERS FOUND IN THE LOCKED LUGGAGE COMPARTMENT OF AN AUTOMOBILE MAY NOT BE SEARCHED WITHOUT A WARRANT.

The government has seized upon the Court's invitation to address whether the

decision in Robbins should be reconsidered to argue the broad proposition that any container found in the trunk of an automobile, stopped and seized upon probable cause, should be subject to warrantless search. The Court previously has considered and squarely rejected similar arguments in Sanders and in Robbins. The Court should once again and flatly decline the government's invitation to create such an unjustifiable extension of the narrow automobile exception to the Warrant Clause.

The government's Brief restates the arguments in Sanders and Robbins and advances no new reasons why the proposed exception should be created. The fatal flaw in the government's position is its refusal to come to terms with the decision in Chadwick that reasonable and legitimate expectations of privacy attach to

containers, even when located outside the home or office. In the final analysis, the government's argument reduces to two practical considerations, neither of which supports the rule for which the government contends: (1) the familiar assertion that police officers are unnecessarily inconvenienced by the necessity of obtaining a search warrant for containers found in automobiles; and (2) the promise that its proposed "bright-line" test would resolve the doctrinal uncertainty in this area and thereby reduce the burden automobile search cases impose on judicial resources. As we show below, the Court should reject the government's invitation to overturn the considered development of the law in this area.

A. Important Expectations of Privacy Prohibit Warrantless Searches of Containers Located Temporarily in the Luggage Compartment of an Automobile.

1. Containers Are Protected by the Fourth Amendment and Do Not Forfeit That Protection Because They Are Located Temporarily in a Locked Automobile Trunk.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[6] This Court long has held that, to be "reasonable," a search ordinarily must be conducted on the basis of prior authorization granted by a neutral magistrate in the form of a valid search warrant.[7] The Court has so held primarily

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6/ U.S. Const., Amend. IV(1)(c) (emphasis added).

7/ E.g., Arkansas v. Sanders, supra, 442 U.S. at 758-59; Mincey v. Arizona, 437 U.S. 385, 390 (1978); United States v. Chadwick, supra, 433 U.S. at 9.

because of its recognition that law enforcement officers preoccupied with discovering crime may tend to initiate searches where no probable cause exists, or may conduct searches in a wide-ranging and general fashion.[8/] To guard against governmental invasion of the liberties of the law-abiding, the Court has held repeatedly that the warrant requirement is subject only to a few "jealously and carefully drawn" exceptions.[9/] And the government bears the heavy burden of proving the need for such extraordinary exceptions to the Warrant Clause.[10/]

8/ Id. See Arkansas v. Sanders, supra, 442 U.S. at 759 & n.5. The Court has also identified the need to inform the subjects of a search of the legitimacy of police authority as another reason for the warrant requirement. See, e.g., Camara v. Municipal Court, 387 U.S. 523, 532 (1967); United States v. Chadwick, supra, 433 U.S. at 9.

9/ See, e.g., Arkansas v. Sanders, supra, 442 U.S. at 759 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)); Katz v. United States, 389 U.S. 347, 357 (1967).

10/ E.g., United States v. Jeffers, 342 U.S. 48, 51 (1951).

The Court has held that the warrant requirement applies not only to places but also to any personal effects in which people maintain reasonable expectations of privacy, such as mail, luggage, and other possessions. In Chadwick, the Court explicitly held that the privacy interests in such personal effects do not diminish or disappear when they are temporarily located in a public place, rather than in a home or office.[11/] The Court rejected the argument that the Warrant Clause does not apply to "movable personalty lawfully seized in a public place."[12/]

In Sanders, the Court squarely rejected the argument that privacy interests in a piece of luggage disappeared because it was placed in an automobile

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11/ United States v. Chadwick, supra, 433 U.S. at 7.

12/ Id. at 6-7.

trunk. The Court observed that "the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them."[13] It also noted that because "luggage is a common repository for one's personal effects . . . [it] is inevitably associated with the expectation of privacy."[14] Robbins merely reaffirmed this holding when it recognized that many containers other than luggage are also used as common repositories for effects a person may reasonably wish to keep private.[15] The Robbins holding, that a parcel wrapped in opaque plastic embodies a reasonable expectation of privacy for

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13/ 442 U.S. at 764 ("a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations.").

14/ 442 U.S. at 762 (emphasis added).

15/ 101 S. Ct. at 2845-46.

Fourth Amendment purposes, thus merely represents an application of the general rule of Sanders to any container located in a motor vehicle trunk.

The government has not pointed to anything in prior Fourth Amendment jurisprudence which suggests -- contrary to Chadwick, Sanders and Robbins -- that privacy interests in containers are surrendered when they are located temporarily in a locked automobile trunk. Its proposed rule would produce the anomalous result that a container, as to which Warrant Clause protections admittedly attach at both ends of its journey, somehow loses that protection while the owner transports it in a locked vehicle trunk.[16/]

16/ To the contrary, it is settled that the Fourth Amendment applies to persons in motor vehicles. E.g., Delaware v. Prouse, 440 U.S. 648 (1979):

> "An individual operating or traveling in an automobile does

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The principle that containers do not forfeit their Fourth Amendment protections simply because of the place in which they fortuitously become subject to official scrutiny extends at least as far back as Ex Parte Jackson, 96 U.S. 727 (1878). There, in one of the earliest Fourth Amendment cases, the Court held that the Warrant Clause prohibited the warrantless search of

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> not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."

Id. at 662 (footnote omitted).

printed matter traveling through the United States mail, and thus in the physical possession of government employees.[17/] If a parcel suitable for mailing is protected while being hand-carried to the post office and while handled by postal workers, those privacy interests certainly cannot evaporate if it is placed in the locked trunk of a car. But that is the rule the government would have the Court adopt.

As Chadwick, Sanders and Robbins correctly decided, expectations of privacy in movable personalty cannot be found to vary with its location. The owner of a briefcase hardly considers that its contents are less or more private as he carries it from home to office. If he considers the subject at all, he would

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17/ 96 U.S. at 733. Jackson has been reaffirmed recently in United States v. Van Leeuwen, 397 U.S. 249 (1970).

certainly feel the contents are more secure against unwarranted intrusion when they are in the locked trunk of a motor vehicle than when the case is left briefly in an unattended conference room.

The strong privacy interests attached to containers placed in motor vehicle trunks are demonstrated most compellingly by considering the effects routinely carried there. At some point virtually every person will use an automobile to transport the most precious and intimate possessions. What attorney has not transported confidential client documents in a document carrier placed in the luggage compartment of a motor vehicle? What person has not transported personal property across town or across the country in a motor car or moving van? Yet, the government's proposal would make every one of these items subject to a warrantless

search solely upon probable cause to stop and seize the vehicle. The limited privacy interest in automobiles under the Fourth Amendment does not detract from the independent privacy interest enjoyed by the container. If anything, a container placed in a locked trunk should be entitled to an augmented degree of constitutional protection.

The government's argument is fatally flawed by its refusal to accept the Court's decisions in Chadwick and its progeny that reasonable privacy interests attach to personal containers, wherever found. The periodic reiteration of the alleged insubstantiality of privacy interests in paper bags in its Brief should not obscure the breadth of the intrusion into personal liberties its proposed "automobile trunk" exception would condone.

2. The Automobile Exception to the Warrant Clause Does Not Legitimate Warrantless Searches of Containers in Locked Trunks.

The government rests its argument that clear privacy interests should be overridden solely upon the so-called automobile exception to the Warrant Clause. But it is certain that the two justifications for that exception do not apply to containers located in the trunk of an automobile seized for probable cause. Neither the inherent mobility of the vehicle nor its pervasive governmental regulation bears at all upon such containers at that point, as Chadwick, Sanders and Robbins recognized.

This Court has rejected the view that motor vehicles and their contents are exempt from Fourth Amendment principles.[18/]

18/ Delaware v. Prouse, supra, U.S. at 662-63 (1979) ("Were the individual subject

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They may be stopped only upon probable cause, and the Court has carefully circumscribed the scope of searches permitted once a vehicle has been stopped and is in police custody.[19/] The police may seize objects within plain view.[20/] And, if a custodial arrest of an occupant is made, the police may search the passenger compartment as an incident to the arrest.[21/] Once the vehicle and its

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to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.").

19/ See, e.g., id.; Coolidge v. New Hampshire, 403 U.S. 443 (1971).

20/ E.g., Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam).

21/ New York v. Belton, 101 S. Ct. 2860, 2864 (1981). The Court of Appeals held that this search cannot be justified as incident to a lawful arrest. United States v. Ross, supra, 655 F.2d at 1169, and we do not understand the government to argue otherwise. Before the police seized the suppressed evidence, the officers had reduced the property to their exclusive

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contents are securely in police custody and the risk of loss of evidence and of danger to the arresting officer have abated, further warrantless searches are proscribed.[22/]

Accordingly, the Court in Sanders expressly rejected the argument that the automobile exception could justify the warrantless search of a suitcase solely because it was taken from an automobile

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control, and there was no danger that the respondent could gain access to the container to seize a weapon or destroy evidence. See United States v. Chadwick, supra, 433 U.S. at 9; Chimel v. California, 395 U.S. 752 (1969).

22/ E.g., Arkansas v. Sanders, supra, 442 U.S. at 763-64; United States v. Chadwick, supra, 433 U.S. at 15 (". . . a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority."); Preston v. United States, 376 U.S. 364, 376 (1964).

lawfully stopped and searched on a public street. 442 U.S. at 762. The Court rejected the contention that the exigency that justified detaining and seizing the vehicle and its contents without a warrant also authorized the subsequent, warrantless search of the suitcase. The Court held that "the exigency of mobility [of the seized object] must be assessed at the point immediately before the search." Id. at 763. The Court found there was no such exigency "after the police have seized the object to be searched and have it securely within their control." Id. Absent independent exigent circumstances at that point, such as danger to the police or risk of loss of evidence, the Court held a warrant had to be obtained, because the narrow circumstances justifying the warrantless seizure of the vehicle expired with its disablement. Id. at 766.[23/]

23/ These principles were applied in a straightforward manner in Robbins. Only

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Although advocating a new automobile trunk exception, the government claims to have no "quarrel" with this Court's decisions in Chadwick and Sanders.[24/] It attempts to distinguish those cases by claiming that they pertain only where law enforcement officers have specific probable cause focusing on a specific container before it is placed in the trunk.[25/] But, all of these cases are "container" cases, not "automobile" cases as the government argues.[26/] Nothing in their reasoning

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three members of the Court supported the view urged here by the government. 101 S. Ct. at 2851-59 (dissenting opinions of Blackmun, J., Rehnquist, J., Stevens, J.).

24/ See Gov't Brief at 9, 15.

25/ Cf. Robbins v. California, supra, 101 S. Ct. at 2850 (Powell, J. concurring).

26/ See id.; see Arkansas v. Sanders, supra, 442 U.S. at 766 (Burger, C.J. concurring).

supports a distinction based upon the point at which the container was viewed by the police. Neither the expectation of privacy vested in the container nor the exigency of mobility would vary with that change in circumstance.

The government cannot have its proposed new global "automobile trunk" exception to the Warrant Clause unless Sanders, Robbins and (by implication) Chadwick are overruled. As demonstrated below, the government has not discharged its heavy burden of proving the need for a new category of warrantless searches. And the fundamental principle of stare decisis counsels against overturning these three recent, considered decisions.[27/]

27/ "The doctrine of stare decisis imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the

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B. The Government Has Offered No Valid Justification For Creating a Broad "Automobile Trunk" Exception to the Warrant Clause.

The government has advanced several arguments to "meet its 'burden . . . to show the existence of such an exceptional situation' as to justify creating a new exception to the warrant requirement." Mincey v. Arizona, 437 U.S. at 390-91, quoting Vail v. Louisiana, 399 U.S. 30, 34 (1970); see G.M. Leasing Corp. v. United States, 429 U.S. 338, 358-59 (1977).

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> broader societal interests in evenhanded, consistent,and predictable application of legal rules."

Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 (1980) (footnote omitted). Departure from this principle normally is justified only where changes in the historic environment or experience with the rule erodes its validity. See Mitchell v. W.T. Grant Co., 416 U.S. 600, 634-35 (1974) (Stewart, J. dissenting). Neither reason is applicable here.

First, the government contends that, in the circumstances surrounding the search of the trunk of a car seized upon probable cause, the warrant requirement is simply a "procedural" formality, and that the availability of post hoc judicial review of the officer's judgment as to probable cause provides an adequate substitute for prior judicial scrutiny. Gov't Brief at 43. On this point, the government is simply wrong. The purpose of prior judicial scrutiny, and the issuance of a valid warrant, is to establish the particularity of the search to be conducted. The government's proposed rule presumes that particularity need never be established when the search of an automobile trunk is at stake. There is no more justification to permit wholly unparticularized and general searches of automobile trunks than of any other area. And, the Court concluded in Chadwick that prior consideration by a neutral magistrate

is an indispensable predicate to a constitutionally valid container search, because vital Fourth Amendment interests are offended by warrantless searches. 433 U.S. at 9.

Second, the government argues that the suspect's arrest constitutes such a substantial invasion of his privacy that the minimal additional intrusion resulting from the warrantless search of a container found in the trunk is constitutionally insignificant. The Court previously has rejected this claim in, inter alia, Mincey v. Arizona and Chimel v. California, 395 U.S. at 766-67 n.12.

Third, the government suggests that, at least for the innocent, a prompt warrantless search of possessions on the street may constitute a lesser intrusion on privacy than "a custodial arrest while a warrant is sought."[28/] Gov't Brief at

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28/ This point may be of little significance in practice. If the officer

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25-26. As Chief Justice Burger noted in rejecting this argument in Sanders, an individual faced with this choice may elect to avoid detention by consenting to an immediate warrantless search of parcels in the trunk. 442 U.S. at 767 (concurring opinion). But "[innocent] persons might well prefer not to have the contents of their luggage exposed in a public place. They may stand on their right to privacy and require a search warrant." Id. The Fourth Amendment requires that the individual have the right to make this decision for himself.29/

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has probable cause to seize a vehicle suspected of containing contraband, prudent law enforcement dictates, in most instances, the detention of its occupants pending further investigation. Thus, in general, no additional restraint on liberty will be imposed while a warrant is obtained. This is clearly true here where the respondent already had been arrested and the car seized.

29/ The government argues that police officers may "prudently" decline to conduct

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Fourth, the government argues that creation of a new "automobile trunk" exception to the Warrant Clause will serve the administrative convenience of law enforcement officials. Gov't Brief at 43-44. The Court repeatedly and categorically has rejected the government's position that streamlining law enforcement is a sufficient justification for infringing the liberties of the public. As the Court stated in Mincey v. Arizona:

> "The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."

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a search on the basis of consent for fear it may later be contested. Gov't Brief at 27. The government provides no factual basis for this bald assertion.

437 U.S. at 393 (footnote omitted). The Fourth Amendment was intended to limit the government's ability to make warrantless searches. Unless the government can point to some independent constitutional justification for carving out an exception to the Warrant Clause -- a burden the government has not discharged here -- arguments as to law enforcement efficiency alone cannot prevail over recognized privacy rights, lest those concerns erode the Fourth Amendment.

We also disagree with the government's empirical assertion that requiring the police to obtain warrants before searching containers found in car trunks will impose an intolerable administrative burden. As a practical matter, the pertinent question is whether the police should be required to take the additional administrative step of obtaining a search warrant from a

magistrate, while they are engaged in the other administrative tasks necessary to charge and process the suspect, log in the seized vehicle, and account for any material seized from the passenger compartment and its occupants. See, e.g., South Dakota v. Opperman, 428 U.S. 364 (1976). The government does not contend that the minimal delay necessary to obtain recourse to a magistrate will adversely affect its ability to obtain warrants. We submit that recognition of Fourth Amendment principles in these circumstances will impose no material new obligation on the police, especially in light of management techniques, such as staff support and the availability of warrants by telephone,[30/] that may be introduced to simplify the administrative process.

30/ Fed. R. Crim. Proc., Rule 41(c)(2).

Finally, the government suggests that, in addition to streamlining law enforcement, a rule permitting warrantless searches of all containers found in car trunks would greatly simplify judicial disposition of automobile search cases. Gov't Brief at 41-47. We appreciate the evident frustration of this Court and the lower courts in attempting to formulate workable rules to resolve the difficult Fourth Amendment issues presented in automobile search cases. For all its simplicity, however, the government's proposed bright-line test would strip the public of important privacy rights it has enjoyed since the founding of the nation. The rule that a closed container in a locked trunk may not be searched without a warrant is equally unambiguous. If the rule is made clear and followed, both law enforcement and constitutional interests will be furthered, and the burden of

litigation in this Court and others will be reduced. Any rule that creates a new Warrant Clause exemption is an invitation to further judicial debate.[31/]

II. THE FOURTH AMENDMENT'S WARRANT REQUIREMENT APPLIES TO ALL CONTAINERS, WHEREVER FOUND AND HOWEVER "WORTHY" OR "UNWORTHY," UNLESS THEIR CONTENTS ARE IN PLAIN VIEW.

The government asks this Court to overrule Robbins and to limit the applicability of Chadwick and Sanders to luggage and other containers deemed to be "of a kind conventionally regarded as embodying substantial privacy interests." Gov't Brief at 14. The government's proposed "unworthy" container exception to the Warrant Clause would extend to any such containers whether found in an automobile,

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31/ Cf. Robbins v. California, supra, 101 S. Ct. at 2850 (Powell, J. concurring).

an office, a public place or the hands of its owner.[32/] The government thus suggests a radical departure from settled Fourth Amendment principles.

We urge this Court to reaffirm Robbins and to reject this proposed new Warrant Clause exception. As we emphasize below, the "unworthy" container rule finds no support in either the language of the Fourth Amendment or any interpretation of that Amendment made by this Court, and the government has identified no compelling interests that support the creation of such a new Warrant Clause exception. Nor is the rule justified as a factual matter: the government has failed to adduce anything but its own assumptions to support its assertion that no reasonable expectation of privacy attaches to paper bags and other

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32/ See United States v. Ross, 655 F.2d at 1170.

"insubstantial" containers. Indeed, everyday experience refutes the government's claim.

Moreover, the "unworthy" container rule will not provide any clear guidelines for law enforcement officers or reviewing courts. The factors considered relevant by the government are so amorphous and open-ended that such a rule would raise far more nettlesome factual questions than it would resolve. We respectfully submit that Robbins and prior Fourth Amendment cases point the way to a bright-line test that pays due regard to constitutional liberties, is enforceable, would not adversely affect any law enforcement interest, and would provide readily understandable standards for the protection of individual liberties and the enforcement of law.

A. The "Unworthy" Container Rule Finds No Support in the History of the Fourth Amendment or the Decisions of This Court.

Chadwick and Sanders established that even if a warrant was not required to search an automobile, the owner of luggage lawfully seized has an independent, constitutionally protected expectation of privacy in the luggage and that a warrantless search of the luggage was therefore unlawful. Robbins held that the holdings of Chadwick and Sanders applied as well to plastic-wrapped parcels found in the trunk of an automobile. The plurality opinion in Robbins did no more than reaffirm the long-established principle that, absent exigent circumstances, a warrant is required to search "people and their effects, . . . whether they are 'personal' or 'impersonal.'" See Robbins, 101 S. Ct. at 2846. The plurality also considered the relationship between the

"container" rule and settled "plain view" doctrine and concluded that all closed containers whose contents are not readily discernible by observation enjoy a constitutional protection against warrantless searches. We submit that this aspect of Robbins, which applies to containers wherever they may be found, is clearly in accordance with the language of the Fourth Amendment and the decisions of this Court.

As we have already shown, the principle that the Fourth Amendment extends to all of a person's property -- irrespective of how "private" the property is -- has long been established. For example, in Boyd v. United States, 116 U.S. 616, 630 (1886), the Supreme Court interpreted the Fourth Amendment as outlawing, "not the breaking of his doors and the rummaging of his drawers" but "the

invasion of his indefeasible right to personal security, personal liberty and private property."[33/] See Ex Parte Jackson, 96 U.S. at 733 (1878); United States v. Van Leeuwen, 397 U.S. at 251-52 (1970). Accordingly, although Chadwick and Sanders involved sturdy luggage, they were based upon these precedents that recognized, for example, that parcels wrapped in paper deserved protection against warrantless governmental intrusion. E.g., Ex Parte Jackson, 96 U.S. at 733.

Despite these unambiguous holdings, the government maintains that a footnote to

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33/ Similarly, the Court has held that the Amendment's protections against seizures of "papers" and "effects" are coextensive. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." Gouled v. United States, 255 U.S. 298, 309 (1921).

this Court's opinion in Sanders supports what the Court of Appeals below termed an "unworthy" container rule.[34/] The footnote

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34/ The footnote provides:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile."

442 U.S. at 764-65 n.13 (citation omitted). Of course, the footnote decisively repudiates the government's claim, addressed in Part I of this Brief, that the

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fails to provide any support for the government's position. Sanders held to the contrary: That warrantless searches are subject only to the same "'jealously and carefully drawn' exceptions to the warrant requirement" that apply to any other property.35/ The footnote does no more than declare that in some instances the contents of a container, for all practical purposes, may be in plain view, either because the contents are actually visible or because they can be readily inferred from outward appearances. It recognizes that, when the container serves no concealing function, its contents are not private, and the Warrant Clause does not

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mere placement of a container in an automobile lowers its level of constitutional protection.

35/ Id. at 759-60 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).

apply. Thus, the Sanders court merely reconciled the holding in Chadwick with settled plain view principles.[36/] Sanders does not provide justification for a new exception to the Warrant Clause for "non-traditional" forms of plastic, cloth or paper containers.[37/] No member of this

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36/ Justice Stewart's plurality opinion in Robbins explained that the Sanders footnote carried the "negative implication . . . that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment." Robbins v. California, supra, 101 S. Ct. at 2846.

37/ The government looks to Justice Powell's concurrence in Robbins as support for a flat "unworthy container" rule because that opinion would allow warrantless searches only of those containers in which the owner had manifested no reasonable expectation of privacy. Robbins, supra, 101 S. Ct. at 2849-50 & n.3. Under this view, a factual inquiry would be undertaken in each case that would focus on "the size, shape, material and condition of the exterior, the context within which it was discovered, and whether the possessor had taken some significant precaution, such as locking, securely sealing, or binding the container, that indicates a desire to prevent the contents from being displayed upon simple

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Court in either Sanders or Robbins indicated any desire to embrace the government's view that containers should be categorized as either worthy or unworthy of constitutional protection.38/

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mischance." Id. n.3. The practical difficulties of this formulation, which necessarily entails an inquiry into the subjective intent of the accused, are discussed below. See Part II.C. infra.

38/ The government reiterates several policy considerations in support of its "unworthy" container rule. In essence, it argues that the warrant is a formality whose observance should yield to the goal of law enforcement efficiency and that, in any event, the warrantless search of someone's paper or plastic bag is a "lesser intrusion" on his liberty than custodial detention. As we have already demonstrated in Part I above, this Court has decisively and repeatedly held that none of these considerations is entitled to any weight. On numerous occasions, this Court has affirmed the substantial importance of the judicial warrant. E.g., United States v. Chadwick, supra, 433 U.S. at 9-10 (1977); Katz v. United States, supra, 389 U.S. at 350-51 (1967); Camara v. Municipal Court, supra, 387 U.S. at 532. Accordingly, the government's efforts in this context to denigrate the importance of the warrant by reference to claimed policy interests should be summarily rejected.

B. The Government Has Not Substantiated Its Contention That No Person Has a Reasonable Expectation of Privacy in the Contents of an "Unworthy" Container.

Although the absence of any precedential support for an "unworthy" container rule ought to settle the matter, the government's argument suffers from an even more fundamental defect. It concedes, as it must, that luggage and other usual "repositories for personal effects" are entitled to the substantive protections of the Warrant Clause.[39/] The government contends, however, that there are certain

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39/ We note that the government thus accepts the red leather pouch as a "worthy" container fully deserving of constitutional protection, and that it "does not quarrel," Gov't Brief at 9, with the holdings of this Court that vest "traditional" luggage with such protection, even though it is very clear that the government cannot have its extension of the automobile exception unless the Court overrules the very cases with which the government does not "quarrel." We urge the Court not to embrace such befuddlement.

other containers -- i.e., bags, parcels, and boxes of paper, plastic and other flimsy or "insubstantial" materials -- that are so inherently lacking in "substantial privacy expectations" that they are undeserving of the protections of the Warrant Clause. Gov't Brief at 14, 49. The government advances three arguments: First, that some possessions are "personal" and others "impersonal" and that there is no reasonable expectation of privacy in impersonal material; second, that certain containers are only "atypically" used for transporting personal articles and are therefore not entitled to Warrant Clause protections; and third, that no reasonable person would expect to keep the contents of such containers -- whether personal or impersonal -- screened from public view.

We agree with the government that the Fourth Amendment preserves and protects

from governmental intrusion a person's reasonable expectation of privacy. See Katz v. United States, 389 U.S. at 360-61 (Harlan, J., concurring). We submit, however, that a person has a reasonable expectation that all his "effects, whether they are 'personal' or 'impersonal,'" will remain private and shielded from intrusion unless he knowingly exposes them to the public. Robbins, 101 S. Ct. at 2846; Katz v. United States, 389 U.S. at 351.40/ The Fourth Amendment does not discriminate between a container which commonly houses the most intimate of one's belongings and

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40/ The presence or absence of constitutional protection cannot turn upon any purported dichotomy between "personal" and "impersonal" items. The language of the Fourth Amendment recognizes no distinction between "personal" and "impersonal" effects. Indeed, the colonial experience demonstrates that Americans objected strenuously to seizures of smuggled goods from local merchants -- undoubtedly "impersonal" effects. See United States v. Chadwick, supra, 433 U.S. at 7-8.

one which commonly contains only the most prosaic. Absent exigent circumstances, the government simply has no business examining the contents of either container without a prior determination of probable cause by a neutral and detached magistrate.

Everyday experience disproves the government's claim that no reasonable person would put anything personal or private in a paper bag, or other similarly flimsy container. Even the government is forced to admit that an "unrepresentative" use is a "theoretical possibility." Gov't Brief at 36. But it urges this Court to overlook such an "atypical use" on the ground that if such a use is "not part of the conventional 'understandings that are recognized and permitted by society,'" it is not worthy of constitutional protection. Id. It goes without saying that the idea that "convention" ought to define the scope

of the Fourth Amendment is unprecedented. Many people cannot afford or do not choose to own the sort of "substantial" luggage that the government views as essential to preservation of Fourth Amendment protections. The Warrant Clause protects the vagrant's ragged shopping bag no less than the double-locked footlocker in Chadwick. See United States v. Ross, 655 F.2d at 1170 n.30.

In any event, the government's proposed standard is bereft of any foundation in fact. It has not attempted to provide any authority to support the startling claim that articles that their owners wish to shield from public or official scrutiny are not placed in flimsy containers. People choose a wide variety of containers for a multitude of purposes, and these choices change constantly. Experience demonstrates that, when

traveling on airplanes and trains, many people carry belongings of a highly personal nature in plastic shopping bags, secured at the top with a drawstring and bearing some merchant's insignia, or in the ubiquitous luggage of choice, open-top totebags. Although a few decades ago, travelers may have found matched luggage a necessity, people now transport their possessions in insecure containers of canvas, paper and pliable plastic. Are Fourth Amendment protections to vary according to whether these individual choices are "recognized and permitted by society"?

As for the paper bag or similar container, its very anonymity actually encourages its use for storing or transporting highly private possessions. For example, paper shopping bags are thought by many to be particularly suitable

for disguising bank deposits. Similarly, it is a commonplace that some reading materials, protected by the First Amendment, may come into their owner's possession in a plain brown wrapper. Thus, in any particular case, the police cannot know whether the "unworthy" container is truly "unworthy" until the privacy of its owner has already been invaded by a warrantless search. See United States v. Ross, 655 F.2d at 1170 & n.31.

In fact, the government's claim that no one puts anything private in a paper bag is belied not only by this very case -- in which respondent apparently placed heroin in a brown paper lunchbag -- but also by Robbins and a plethora of lower court decisions involving items seized from such containers as closed and open cardboard boxes, sealed plastic garbage bags and partially open plastic bags. See United

States v. Ross, 655 F.2d at 1166 & n.16; Gov't Brief at 31 n.18. The very controversy now before the Court proves that "unworthy containers" are very often "pressed into service" as repositories for effects that people wish to conceal from public view. See Gov't Brief at 36.

Indeed, all of us have put some of our most treasured secrets and most intimate possessions in "unworthy" containers when we have put them in the mail. Yet, the government concedes, as it must, that a paper envelope entrusted to the United States mails deserves the protection of the Warrant Clause. See United States v. Van Leeuwen, 397 U.S. at 251-52.

Finally, this Court should resist the government's implication that as long as the search of a container "not embodying substantial privacy interests" does not turn up evidence of a crime, the individual

does not have a substantial ground for constitutional complaint. Gov't Brief at 24. An ordinary person has every right to be incensed if his possessions, however innocuous, are searched under color of law in a public place. The innocent victim of a warrantless search is injured -- indeed irreparably injured -- even if all that the search turns up is his "next meal." See id. Such a search not only provokes intimidation and fear of false arrest, but may degrade his reputation in the most basic sense. Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389-90 (1971). Absent a warrant or some well-established exception to the Warrant Clause, the government is simply not entitled to know what that person has stored in his brown bag, however mundane those contents are.

C. The Government Concedes That the "Unworthy" Container Rule Would Not Advance the Goals of Administrative and Judicial Efficiency.

Even if law enforcement efficiency were a justification for undermining Fourth Amendment protections -- which it is not -- the government has conceded a critical flaw in its own case: That its "unworthy" container rule will initially require "case by case delineation of the types of containers possesing [sic] high enough privacy attributes to justify insistence upon a warrant." Gov't Brief at 40. The government in effect concedes that the "unworthy" container rule is not a rule at all, or at least not a rule that is susceptible to even-handed and expeditious application by law enforcement officials, or by courts required to resolve the welter of pre-trial suppression motions certain to result.

In return for a rule that allows law enforcement officers to rummage freely through bags and parcels of unspecified description, wherever found, the government offers no countervailng administrative or judicial efficiencies. For example, although the government would like this case to decide that respondent's closed but unsealed paper bag is not worthy of the protections of the Warrant Clause, the treatment of a sealed paper bag would be undetermined and ripe for further litigation. Also left for case by case resolution by law enforcement officers -- and for reviewing courts -- would be the constitutional protection to be accorded the totebag, the orange crate and the pillowcase. See Sanders, supra, 442 U.S. at 772 (Blackmun, J., dissenting).

In fact, the government's proposed rule is so vague, open-ended and

unprincipled that one cannot predict with any degree of certainty that a paper bag identical to the one in respondent's trunk will not encounter an entirely different fate in the next case. The government concedes:

> "This case does not present the question whether, by reason of its particular features, its appearance, its surroundings, the conduct of the person claiming Fourth Amendment protection, or other circumstances, an individual may so manifest his expectation of privacy in a container ordinarily employed for low-privacy uses as to render a warrantless search of the particular container unreasonable."

Gov't Brief at 37 n.21 (citations omitted). There can be little doubt of the import of this admission: The government's theory requires inquiry into the accused's subjective intent, as revealed by the totality of the circumstances. Thus, the very same paper bag for which the

government seeks a reversal in this case will come before the federal courts again. On that later occasion, presumably, the inquiry will be whether the owner of that paper bag manifested a reasonable expectation of privacy in its contents. One can imagine how the owner will testify, if asked at a suppression hearing.

The government argues, however, that the Court need not concern itself here with this "theoretical possibility" because:

> "Absent such [objective factors], however, an owner's subjective expectation of privacy (and there is no showing here that respondent had any such subjective expectation) should be insufficient to trigger the warrant requirement."

Id. (emphasis added). We find this assertion astonishing. First, for the reasons set forth above, it is clear that objective criteria, such as the characteristics of the flimsy container,

cannot reveal the privacy interests of the owner. Second, respondent was not afforded an opportunity to prove that he had a subjective expectation of privacy in the contents of the bag. Furthermore, we are unaware of any facts in the record that would lend any degree of plausibility to the government's contention that respondent did not manifest a reasonable expectation of privacy -- whether subjective or objective -- in the contents of the bag. To the contrary, the facts of record show that the bag was closed and secreted in the locked luggage compartment of respondent's car.

Far from establishing a bright-line test to advance administrative and judicial efficiency, the government's "unworthy" container rule promises only to perpetuate "incessant litigation" of automobile search cases. See Robbins, 101 S. Ct. at 2850

(Powell, J., concurring). We urge the Court to resist the government's plea for a reversal in this particular case, on a theory it concedes will only bring this very issue before the courts again.

CONCLUSION

We advocate a bright-line test which is completely consistent with the Fourth Amendment, as construed by this Court; easily comprehensible and enforceable by law enforcement officials; and designed for ease in judicial administration: If a container found in an automobile trunk conceals its contents, then that container is protected by the Fourth Amendment, and the police must obtain a search warrant before they may search it. This rule is supported by the language and prior interpretations of the Fourth Amendment, is feasible of administration, and will substantially reduce judicial enforcement

difficulties by directing all remaining questions to familiar and settled notions of probable cause and the plain view doctrine.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERT ROSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Rex E. Lee, Solicitor General of the United States, Counsel for Petitioner, and William J. Garber, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* thirty-six times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

AELE and IACP well know the problems faced by police officers in their good faith attempts to conduct searches and seizures that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to the search of automobile trunks compels these organizations to speak on behalf of law enforcement officers in this case.

ARGUMENT

I.

THIS COURT SHOULD CLEAR AWAY THE INCOMPREHENSIBLE DISTINCTIONS EXISTING IN THE RULES FOR WARRANTLESS SEARCHES OF AUTOMOBILES AND ADOPT A BRIGHT LINE RULE FOUNDED UPON THE ORIGINAL PURPOSE AND INTENT OF CARROLL V. UNITED STATES THAT CAN BE UNDERSTOOD AND APPLIED BY POLICE OFFICERS

Americans for Effective Law Enforcement has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police.* Those briefs always presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with any extended analysis of the case law. We confine our brief essentially to a suggested resolution of the perennial police dilemma caused by the intolerable confusion that confronts them as they must determine what containers within an automobile they can or cannot search—*after having already made an accurate judgment as to probable cause to search the vehicle itself.*

We urge the Court to adopt a rule which would permit the search of all containers found in a vehicle when the prerequisites for a search of the vehicle itself have been satisfied, as prescribed in *Carroll* v. *United States,* 267 U. S. 132 (1925). We will suggest only one qualification which, in view of the limited types of motor vehicles available at the time of the *Carroll* decision, did not receive consideration from the Court in that case.

The decisions which protect some containers from searches while allowing others to be searched are based upon the test of "reasonable expectation of privacy." That test evolved in *Katz* v. *United States,* 389 U. S. 34 (1967), in which the Court concerned itself only with the question of whether a search had actually occurred within the meaning of the Fourth Amendment. It might seem highly irrational, therefore, to hold that a search occurs in violation of the Fourth Amendment when the police make a non-consensual inspection of a suitcase found in an automobile, but that no search occurs when the police inspect a paper bag found in the vehicle. The issue should only be whether the search was reasonable. It is impractical, and of no guidance to the police, to make the reasonableness of a search of a container depend upon the precise degree of privacy expectation with respect to each such container.

There are myriad grades of expectation of privacy, just as there are myriad grades of police intrusion. This Court has indicated in *Dunaway* v. *New York,* 442 U. S. 200 (1979), that the police need fixed standards and that a sliding scale approach with an infinite number of gradations is unsatisfactory. The citizen is better protected if the officer clearly knows what is permissible and what is not.

The "expectation of privacy" test in automobile search and seizure cases offers no satisfactory guidance to the police with respect to containers within the vehicle. It does not provide an understandable distinction between a paper bag and a leather pouch. Nor does it distinguish between a glove compartment or the trunk of the car; or between a station wagon and an ordinary passenger car. The Court apparently thought it was doing that in *Robbins* v. *California,* ____ U. S. ____ (1981), and *New York* v. *Belton,* ____ U. S. ____ (1981), but what the police need is understandable guidance rather than esoteric distinctions which are meaningless to them.

Requiring the police to pursue the only available safe sure investigative practice of seeking a search warrant for the

examination of containers or for searching closed portions of a car produces several unfavorable consequences. First of all, where there is probable cause to search an automobile—and this is the premise for all we suggest—a magistrate will rarely refuse to issue a warrant. In such instances police compliance with a formality may be viewed as a satisfaction of the majesty of the law, but the price for this unnecessary reward is an unaffordable one. It is unaffordable not only in terms of police service but also as regards the judicial system as well.

Secondly, police time is desperately needed for the detection and prevention of crime, and for the apprehension of dangerous offenders. The time needed for the procurement of a warrant to search the contents of a car could be better devoted to those purposes. Several hours may be required for a police officer to draft and present in court a search warrant application and a proposed search warrant. Meanwhile, another officer has to spend his time securing the vehicle. Then, too, in rural areas an even longer period of time may be required to obtain a warrant. Thirdly, as this Court knows all too well, the judiciary is greatly overburdened with cases awaiting determinations of guilt or innocence, and they have precious little time to spend on formality compliances.

In addition to wastage of police and court time, consideration is in order for the motorist whose vehicle containers do not in fact contain illegal evidence, irrespective of the existence of probable cause for the search. An on-the-scene search would have conserved his time as well as that of the police and the court. This was one of the considerations underlying the Court's decision in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), which re-affirmed the right of officers to make a warrantless search under the *Carroll* doctrine.

We urge the Court to adopt a rule in automobile search cases comparable to that applicable to the search of an arrested person. Of him a full search is permissible, regardless of whatever expectations of privacy he may have had as to the

contents of his pockets. A clear cut pronouncement should be made by the Court that *once there is probable cause to search a car, the police may search any container within any part of the car.* The only qualifications to the rule should be that if the vehicle is used for residential purposes—*e.g.*, a house trailer or camper—its containers may be searched only pursuant to a search warrant, absent exigent circumstances. As to the exclusionary rule in this type of case, and, in fact, all others, exceptions should be made for good faith mistakes by police officers.

If the police abuse the suggested container—search privilege, there are adequate available legal remedies, criminal and civil. Then, too, the force of public opinion is a factor that should not be overlooked, especially in this type of case where the Court has granted a guide-lined privilege urged upon it by the police themselves.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed on the facts and law, and on the basis of sound judicial policy.

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